IN THE

SUPREME COURT OF THE UNITED STATES

JUNE, 1979

NO. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

-V.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia which was argued on November 20, 1978, decided February 27, 1979 and the rehearing was denied March 27, 1979.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in Godfrey V. The State, 243 Georgia 302 (1979) and is set out in Appendix A hereto, pp 1a-17a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was final on March 27, 1979 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), petitioner having asserted below and asserting her deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-1101

> "Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. Section 26-3102

> "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-1502

"Plea of Insanity, How Tried. Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue of that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the Milledgeville State Hospital, there to remain until discharged in the manner prescribed by law."

Ga. Code Ann. Section 27-1503

"Acquittal because of Insanity; Contents of Verdict; Confinement of Prisoner. In all criminal trials in any of the courts of this State wherein an accused shall contend that he was insane or mentally incompetent under the law at the time of the act or acts charged against him were committed, the trial judge shall instruct the jury that, in case of acquittal on such contention, the jury shall specify in their verdict that the accused person was acquitted because of mental irresponsibility or insanity at the time of the commission of the act. If such a verdict of acquittal shall be returned by a jury in any case, it shall thereupon became the duty of the trial judge to retain jurisdiction of the person and to order the person to be confined in a State hospital for the mentally ill, to be selected by the Department of Public Health, for a period not to exceed one year, and to provide in said order that such person shall not be released from said hospital upon compliance with the terms and provisions of Chapter 88-5, relating to hospitalization of the mentally ill, as amended. Should continued hospitalization be necessary following the initial period of hospitalization ordered by the trial judge, the superintendent shall apply for an order of continued hospitalization under the provisions of Section 88-506.6, relating to the procedure for continued hospitalization."

Ga. Code Ann. Section 27-2534.1

"Mitigating and aggravating circumstances; death penalty. (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the (statutory) aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. Section 27-2537

"Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ on appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the

provided in Code Section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

Ga. Code Ann. Section 26-603

Acts Presumed To be Wilful. "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted."

Ga. Code Ann. Section 26-604

Consequences presumed intended. "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."

Ga. Code Ann. Section 26-605

Intention a question of fact. "A person will not be presumed to act with criminal intention, but the trial facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

Ga. Code Ann. Section 26-606

Presumption of sanity. "Every person is presumed to be of sound mind and discretion but the presumption may be rebutted."

Ga. Code Ann. Section 26-702

Mental capacity; insanity. "A person shall not be found guilty of a crime, if at the time of the act, omission, or negligence constituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence."

The legislative committee notes titled "Criminal Act and Mental State" found in the Criminal Code of Georgia after Chapter 26-6 at pages 88 and 89 of Book 10 are set out as Appendix B to this petition since they are important in the Court's consideration of the Question Number Six raised herein regarding the Court's failure to charge Defendant's Request to Charge Number Eight incorporating the above referred to Statutes from Chapter 26-6 regarding criminal intent under the circumstances of this case.

QUESTIONS PRESENTED

1. (a) Whether the death sentence in this case based upon the jury's partial finding of the seventh aggravated circumstance (GCA Section 26-2534.1 (b) (7), was so incomplete under the statutory language as to be void and deprived the petitioner of the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

(b) Whether by upholding the death sentence on this partial finding of an aggravated circumstance and upon the facts of this domestic killing involving powerful emotional provocation, the Supreme Court of Georgia has adopted the open-ended construction of this seventh aggravated circumstance disapproved by this Court in Gregg V. Georgia?

(c) Whether the death sentence review conducted by the Supreme Court of Georgia in this case was so superficial as to have violated the petitioner's right to due process of law and the equal protection of the law as guaranteed under the Constitution of the United States?

2. Whether the dismissal of petitioner's challenge to the constitutional composition of the Grand Jury which indicted him on the grounds that it was not timely filed because filed after the indictment was rendered, even though such filing was over a month before the arraignment and trial date deprived the petitioner of the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Did the trial court's failure to give a requested charge on manslaughter, under the facts of this case where there was substantial evidence of extreme emotional provocation, deny the petitioner the due process of law and the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States?

4. Is the showing of gruesome, bloody color photographs to the jury, where the evidentiary basis for their admission is tenuous, if not non-existent, and certainly cumulative, so inherently prejudicial as to have violated the petitioner's rights to due process and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

5. Did the failure of the trial court to specify or elaborate regarding particular mitigating circumstances involved in this case in the court's charge to the jury on the sentencing phrase of the trial violated the petitioner's rights to due process of law, a fair trial, and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States?

6. Did the trial court's failure to give Defendant's Request to Charge Number Eight, which tied together various aspects related to proof of criminal intent, and which concisely, and legally, stated the Georgia law upon which the defense was based, violate the petitioner's rights to due process of law, and a fair trial under the Fourteenth Amendment to the Constitution of the United States?

7. Is the antiquated Georgia practice of reading from Georgia Supreme Court cases, in the direction of the judge, and in the presence of the jury, so inherently fraught with prejudice that it denies the due process of law and the right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States? Or, if not, was the Georgia rule misapplied in this case by allowing the district attorney to read the facts of a similar case that had been upheld by the Supreme Court of Georgia, in front of the jury, and thereby violating the petitioner's right to due process, fair trial, and equal protection of the laws under the Constitution of the United States?

8. Is the Georgia death penalty statutory scheme unconstitutional because it does not include a option whereby the jury may recommend a sentence of life without the possibility of parole ?

STATEMENT OF THE CASE

Robert Franklin Godfrey, the defendant named above as petitioner, was indicted for the murders of his wife and mother-in-law and the aggravated assault upon his young daughter by the Polk County Grand Jury on December 15, 1977, wherein it was alleged these offenses were committed by him on September 20, 1977.

The petitioner had a previous history of confinement at the Central State Mental Hospital in Milledgeville, Georgia. He had been at Central State in 1950, 1966, and 1970, and once at the Veterans' Administration facility in Murfreesboro, Tennessee. (TR-364) These confinements were due to a drinking problem, connected with depression and violent episodes toward his wife. (TR-439) The petitioner endured these confinements voluntarily so that his wife would take him back, and he and his wife were always reconciled after the petitioner was confined for short periods of time, the most being two months. (TR-364) The Defendant had also undergone brief treatment by a psychiatrist, Dr. William S. Davis, in the mid-sixties in Rome, Georgia, when Dr. Davis practiced there before moving to Atlanta.

The defendant had been employed for approximately 25 years, with two short breaks, at the Northwest Regional Hospital in Rome, Georgia. In the earlier years, the defendant was a surgical nurse and in recent years his duties involved post-operative care and routine duties upon the wards. He was described by the head nurse and supervisor, Mrs. Jean Lebkicker, (TR-293 - 294) and the chief surgeon, Dr. Joseph Liang, (TR-299, 300), who testified to his good reliable honest character based upon working with him for over 20 years, as believable, very good and reliable at his work, and particularly gentle with patients and especially children. The defendant had been a combat medic in World War Two and Korea. (TR-424) The defendant suffers from extreme hypertension and is a diabetic who can not tolerate insulin (TR-368). In 1976, the petitioner ran as Chief Deputy Sheriff with the losing candidate in the Sheriff's race in Polk County.

On September 5, 1977, the defendant got into an allegedly violent argument with his wife and pulled a knife on her. (TR-366) His wife then left him and stayed with relatives for a short time thereafter moving in with her mother. Her mother lived in a trailer approximately 200 yards downhill from the defendant's house. The trailer was situated next to a nephew's trailer and in the backyard of a house on the main road where

the defendant's married daughter lived. The defendant's house was at the end of a long driveway going in near the house and trailers and winding up through some trees onto a hill. During the separation, the defendant talked with his wife on three occasions briefly but she would not agree to move back home. (TR-367)

Then Mrs. Godfrey had divorce papers served upon the petitioner in which she asked the Court to award all the property and their minor daughter to her. Mr. Godfrey did not consult with a lawyer. The hearing upon the divorce was set for September 22, 1977. Throughout the separation, Mr. Godfrey was very anxious to reconcile with his wife as had always occurred in the past. (TR-374,375)

On September 20, 1977, the petitioner went to work as usual and performed his normal duties throughout the day at the hospital in a normal manner. He was called sometime during the day by his mother-in-law and told that his wife wanted to talk with him by telephone that evening. This led the defendant to hope that their differences would be resolved. The petitioner got home around 4:00 o'clock, P. M., and fixed himself something to eat. Mrs. Godfrey called him around 5:00 to 5:30 o'clock, P. M., they argued, and she would not agree to reconcile with the petitioner and stated that she wanted all the property as well. Mrs. Godfrey hung up after saying she would call back later. The petitioner testified that he was extremely depressed by this. (TR-373,375)

Mrs. Godfrey called back later, approximately 7:30 o'clock, P. M., according to petitioner's testimony, but he was not sure about the time. (TR-376,378) This second conversation, according to the petitioner, was more heated and Mrs. Godfrey ended the call with a final rejection of petitioner's attempt to save the marriage and by again telling the defendant that she wanted all the property and would see him in court. Upon hanging up the telephone the defendant testified that he had never in his life experienced such a low feeling, as if kicked in the stomach, and then he blacked out and has no further memory of the subsequent events until the following day when he woke up in the Polk County jail. (TR-379)

The evidence, through various witnesses, established that the petitioner, at some time shortly after the second telephone call, got his single shot 20 guage shotgun and walked down the hill to his mother-in-law's trailer where Mrs. Godfrey, Mrs. Wilkerson, the mother-in-law, and petitioner's 12 year old daughter were seated around a table playing cards. The petitioner then shot his wife through the window in the forehead killing her instantly and proceeded into the trailer and hit his daughter on the head with the gun as she ran out towards the married daughter's house. The petitioner then shot his mother-in-law in the head with one shotgun blast killing her instantly. Petitioner then called the Polk County Sheriff's office and told the dispatcher, after identifying himself, to tell the Sheriff that he had just blown his wife's and mother-in-law's heads off and to come and get him. (TR-198)

The petitioner then went outside into the yard and placed the shotgun in the branches of an apple tree. Then he went toward his married daughter's house near the road and sat down in a chair under a shade tree to wait for the police. When the police arrived he told them "they're dead, it's all over with", and showed one officer where the gun was placed in the tree. He was described by all of the officers as very calm looking, steady on his feet, with no odor of intoxicants on his breath, and it was all of the officers opinion that he was definitely not intoxicated. (TR-276) Concerning his mental state at the time of the shootings, it is significant to note that all of his previous history of violence was associated with very heavy intoxication, whereas, on this occasion, he had not had anything to drink. (TR-364) Later, at the Polk County Police station, according to one officer with whom he was left alone, and who made no tape recording or written statement, the petitioner allegedly told this particular officer that he had done a terrible thing, had thought about it for a long time, and would do it again. (TR-239)

At the trial, the defense marshalled testimony relative to the petitioner's mental state at the time of the shootings. Dr. William S. Davis, a highly qualified psychiatrist who is on the clinical teaching staff at Emory Medical School and is Past President of the Georgia Psychiatrists Association, testified that in his opinion the second telephone conversation with his wife, created such an emotional trauma and provocation that it caused the petitioner to go into an altered state of consciousness described by Dr. Davis as a dissociative reaction, as evidenced by the blackout of memory and the petitioner's previous history of blackouts. Dr. Davis further testified that in this state the petitioner's conscious will could not control his subconscious impulses and resulting acts. Dr. Davis had seen and treated the defendant in the mid-sixties in Rome when Dr. Davis was with Harbin Clinic and had also seen him on two occasions, pursuant to court

order, in the month prior to the trial of the case. The second visit to Dr. Davis' office at Peachtree Parkwood Mental Hospital, where he is Chief of Staff, was specifically for a sodium amytal (properly known as truth serum) interview to determine, among other things, the petitioner's truthfulness concerning the loss of memory and the emotional trauma he felt at the recognition that he would not, finally, be able to once again save his marriage. Significant portions from the transcript of Dr. Davis' testimony are set out as follows:

" Q. Doctor, based on his relation of this history to you and your previous knowledge of him, were you able to upon your examination to form any kind of opinion to what the state of his mind was at that time - on the 20th after the last telephone call?

A. Yes, I decided that on the 20th after the telephone call that he had a .....what is known as a dissociative state, a dissociative attack, and that this attack lasted from the time he first realized that she was not coming back home until he woke up the next day in jail and came back to his senses at that point in time. (TR-313).....

A. Yes sir, a dissociative state, I guess a dissociative state is the most common psychiatric condition which is known to be one of the most common non-psychotic psychiatric conditions which is responsible for some alteration in consciousness. In a dissociative state a person can just actually cut off from his mind oh, stimuli such as say bodily sensations may not come through to awareness. He may cut off from his mind awareness of what is going on around him, he may cut off from his mind memory, all of these things can cut from mind when in a state of dissociation. And in such a state a person may be able to carry out thoughts, feelings, impulses, which he could not release were he in his normal state of conscious awareness. I guess you might say in that condition a person might be acting sort of automatically, that his will, if you will, his will was absent or greatly reduced may be example.....(TR-314,315).....

Q. (Hypothetical questions stated) .....The question is, assuming those facts are true, is that consistent with the type mental state that you have described to us, or unusual?

A. Yes, it is. A person in a state of dissociation can carry on a conversation and unless someone is familiar with dissociative states and happens to think about it, they could appear to be, you know, reasonably normal or almost completely normal. One thing about that whole scene that really struck me as further, at least in my mind, evidence that he was in a dissociative state was his very normalcy, if you will. The fact that he showed no emotional upset, that he was not torn up after having done such a thing as he did, the fact that he was very calm, very quiet about the whole thing, that in of its self to me is abnormal. The fact that he appeared so normal in such conditions is to me abnormal and says to me that there was something, you know, going on haywire inside his head. Whereas, the feeling was split off from the action that he had actually done, it had been dissociated. (TR-317, 318) .....

Q. I am speaking of after the telephone call (the second phone call) with his wife. In your opinion was the defendant's mind or reasoning power to any extent impaired thereafter?

A. Okay, yes, I think that it was and it must have been because at that point in time he was .....remembers being ..... he remembers being overwhelmed with a feeling of despair. He remembers.....well, he said he was like being kicked in the stomach, he said that he never ....he had wrestled and he had fought but he had never been hurt physically anything like as badly as he was hurt when he finally realized that it was over. There was no chance for reconciliation, and then he says to me that everything just sort of faded away, went black, and I think at that point his conscious....the over.....the emotion I started to say overwhelming emotion, and I think it was an overwhelming emotion, I think the emotion of the final finality of her rejection really did overwhelm him and he went into this state of dissociation.

Q. Do you have an opinion as to whether or not his acts immediately thereafter that evening would be the product of his will?

A. I think that these are acts that he could not have done had he been at himself consciously. I think had he been in his usual state of conscious awareness this act was at the time so abhorrent to him that he could not have done it.

Q. While someone is in this state of dissociation, can they exercise control over their ....does their will, conscious will, have the ability to exercise control over their automatic actions?

A. Not the same.....no. Not to the same degree. Not to any thing like the same degree as would occur when he was normally aware and alert.

Q. When a person is in this type of state do you have an opinion whether or not they are able to distinguish between right and wrong and to be able to consciously control their actions relative to that?

A. I think they might know the difference between right and wrong but their ability to control powerful emotional forces acting on them is markedly reduced and I think in such a state a person might very well not be able to exercise control to such a degree that he could prevent himself from doing something which he knew was wrong." (TR-320 -324)

Dr. Davis testified that the petitioner could not remember the crimes even after receiving an injection of sodium amytal, although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

The State's experts from Milledgeville, the State Mental Hospital, agreed with the description of the dissociative state as described by Dr. Davis, but, of course, felt that the defendant did not experience one. The State's psychiatrist and psychologist, as well as Dr. Davis, agree however that this dissociative state is not a psychotic condition. The State's experts were a young psychologist with ten months experience and the other, a psychiatrist who had been at Milledgeville for a good many years and who not remember very much about the interview with the petitioner while he was at Milledgeville under court order for examination a month before the trial of the case.

On March 9, 1978, the jury brought back guilty verdicts on all counts of the indictment and upon the sentencing stage, fixed the punishment at death and designated as the aggravating circumstance or circumstances: "That the offense of murder was outrageously or wantonly vile, horrible, and inhuman." Even though the statutory aggravating circumstance reads as follows: "That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." (Emphasis supplied by counsel) The District Attorney, in addressing the jury on the sentencing phase, had announced that torture was not involved, and aggravated battery was not involved. (TR-570,571)

On Monday, March 13, 1978, the Court sentenced the defendant to death by electrocution and set the date at April 14, 1978 at 11:00 o'clock, A. M, and gave the petitioner ten years to serve on the aggravated assault conviction. A Motion for New Trial was timely made and after a few months waiting for the record to be prepared, the Motion was overruled and a Notice of Appeal was timely filed to the Georgia Supreme Court. Petitioner's Brief was filed in said Court October 22, 1978 and the case was argued November 20, 1978. The convictions and sentences were upheld by the Court, with two dissenting Justices, on February 27, 1979 and the Rehearing was denied on March 27, 1979.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The entire Georgia Death Penalty Statutory Scheme was attacked in a pre-trial Motion to Dismiss which was overruled by the Trial Court and pursued as Enumeration of Error Number 19 in the appeal to the Georgia Supreme Court. In the brief before the Georgia Supreme Court, petitioner argued that the partial finding of the statutory aggravating circumstance rendered the death sentence void on constitutional grounds but the Georgia Supreme Court rejected all of these arguments and approved the phraseology used by the jury.

2. The petitioner's pre-trial Motion challenging the Array of Grand Jurors was dismissed as not timely filed and was attacked in the appeal to the Georgia Supreme Court in Enumeration of Error Number 7 as depriving petitioner of due process of law and equal protection of the laws under the United States Constitution, which argument was upheld based on the Georgia rule which by implication rejected the constitutional objections raised by the petitioner.

3. The petitioner's timely Request to Charge on the law of manslaughter was refused by the trial court and alleged as a deprivation of due process and equal protection of the laws and a deprivation of the privileges and immunities guaranteed under the United States Constitution in Enumeration of Error Number 8 which was upheld by reference to the Georgia Manslaughter Statute but which by implication rejected the petitioner's constitutional objections.

4. Petitioner's objections to the gory color photographs were raised by a Motion in Limine prior to trial and objected to at trial and raised in Enumeration of Error Numbers 5 and 14 on the appeal to the Georgia Supreme Court and were rejected by the Georgia Supreme Court citing Georgia law but by implication rejecting the petitioner's arguments that their introduction before the jury deprived him of a fair trial and due process of law under the United States Constitution.

5. Petitioner's objection to the trial court's charge on the sentencing phase regarding insufficiency of the charge on mitigating circumstances was raised by Enumeration of Error Number 13 to the Georgia Supreme Court. This aspect is required to be reviewed by the Suprdme Court of Georgia under the Statutory Scheme and the

process of law and the equal protection under the laws and a fair trial under the United States Constitution.

6. The trial court's failure to charge the defendant's request to charge Number 8 regarding criminal intent was excepted to at the proper time and alleged as Enumeration of Error Number 23 in the appeal to the Georgia Supreme Court. There it was argued that the denial of this charge, which accurately stated the law in Georgia, and which contained petitioner's legal defense, deprived him of the due process of law and a fair trial which argument was rejected by the Georgia Supreme Court without citation but by implication rejecting appellate's constitutional arguments.

7. The reading by the District Attorney from the facts of a similar Georgia Supreme Court case infront of the jury was objected to at trial and raised on appeal as Enumeration of Error Number 32 to the Georgia Supreme Court where petitioner argued that it was a violation of due process and denied him his right to a fair trial before an impartial jury. The Georgia Supreme Court rejected this argument citing a State law and a Georgia Supreme Court case in Division 13 of the opinion but by implication rejecting petitioner's constitutional objections to the procedure.

8. Petitioner's objection to the Statutory Scheme of the Georgia Death Penalty is fairly comprised within petitioner's pre-trial Motion to Dismiss the Indictment which challenged the constitutionality of the death penalty and the entire Statutory Scheme for its imposition in Georgia. Although not argued in the terms raised here the Georgia Supreme Court's upholding of the entire Statutory Scheme impliedly rejects and thus decides such a question.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. a. The death sentence in this case deprives the Petitioner of due process of law and should be declared void because the jury only made a partial finding of the seventh aggravation circumstance under GCA Section 26-2534.1 b.

Under the Georgia Statutory scheme, the jury must find at least one "aggravating" circumstance before a death sentence can be imposed. The seventh aggravating circumstance which was the only one submitted to the jury in this case is that the offense be:

> "Outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" GCA Section 27-2534.1 b 7.

In this case, the jury found on both counts of murder that the death sentence should be imposed because:

> "The offense was outrageously and wantonly vile, horrible, and inhuman."

Petitioner submits that this partial finding of the "catch-all" aggravating circumstance is incomplete under the law and should void the death sentence on the ground that it deprives him of his life without the process of law. Petitioner submits that such an incomplete finding of the aggravating circumstance is void, the same as no finding of the statutory aggravating circumstance at all and would be analogous to a hung jury on the sentencing phase which would require the imposition of a life sentence. See Miller v. The State, 237 Georgia 557 at 559.

The Supreme Court of Georgia has previously indicated that it does not regard the adjective or first phrase of b 7 as severable from the second or illustrating phrase which begins with "in that it involved".

> "We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman." Harris v. The State, 237 Georgia 718 at Page 733, (Emphasis supplied by counsel)

The jury's findings on the sentencing phase is an incomplete verdict because the statutory language requires the language set out in the jury's findings to be further qualified by the words, "in that it involved torture, depravity of mind or an aggravated battery to the victim." That is, the second part of the statutory aggravating circumstance qualifies and completes the description begun in the first part of the sentence. In this case the prosecutor told the jury that there was no torture involved, and counsel would submit that torture and aggravated battery are substantially similar treatment of the victim, which leaves only "depravity of mind" as relating to the Defendant. Therefore, under the circumstances of this case, the jury's findings should have been that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind." Counsel suggests that the absence of "depravity of mind" in the finding under the facts of this case, where there was substantial evidence relating to the mental state of the Defendant at the time the acts were committed, appears at the least, highly suspicious.

Petitioner submits that this line of reasoning would apply very obviously to some of the other statutory aggravating circumstances, such as b 5: "The murder of a judicial officer... during or because of the exercise of his official duty' is perfectly obvious that a finding of a judicial officer being murdered without the further finding that it was related to the exercise of his official duty, would clearly be void. So the question becomes, if this is a valid line of analysis of Section b 5, then why would it not clearly apply to Section b 7 which is the aggravating circumstance most subject to capricious abuse?

The Supreme Court of Georgia dealt with this argument as follows: "The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable." Slip opinion, pages 14, 15. To allow a death sentence such as the one rendered in this case to stand on such a partial finding of an aggravating circumstance would be tantamount of holding that GCA Section 27-2534.1 b 7 is composed only of the adjective phrase, that is, that the offense is vile, horrible or inhuman. Since this language, standing alone, could so clearly be applied to any murder, Petitioner submits that this would render the seventh act statutory aggravating circumstance invalid and unconstitutional under Gregg v. Georgia, 96 Supreme Court, 2909, as applied to the facts in this case. The application of the death penalty in Georgia would then be wholly "open-ended" and totally subject to the total discretion and caprice of juries.

In the recent Georgia Supreme Court case of Kermit Elmer Holton v. The State, Number 34272 decided March 6, 1979, a similar circumstance, the inverse of the finding in Godfrey, was dealt with as follows:

> "The jury fixed the punishment on both counts of murder as death (by reason of depravity of mind)."

This is only a part of the statutory aggravating circumstance. It omits all reference to the words "outrageously or wantonly vile, horrible or inhuman." See Code Annotated Section 27-2534.1 b 7. See also Ruffin v. State, Number 33865 decided January 24, 1979; Godfrey V. State, Number 34256 decided February 27, 1979.

> "It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on Furman v. Georgia, 408 US 238 (92 Supreme Court 2726, 33 Lawyers Addition 2nd 346) (1972); i. e. such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case. See Gregg, v. Georgia, 428 US 153 (1976). Here, however, although the jury was polled, the Defendant did not object to the form of the verdict at the time of its return. Because there is to be a resentencing trial (see below) this problem should not arise again." Pages 10 thru 11 the Slip opinion attached hereto as Appendix C (emphasis supplied by counsel)

The form of the verdict in Godfrey was likewise not objected to at trial. However, suggesting this as a fatal defect to its consideration is a little like holding that the condemned man on the scaffold with the noose around his neck has an obligation to point out that the hanging rope looks a bit too frayed to hold him. In this country we have constitutional safeguards against forcing self-incrimination, certainly this would include self-prosecution.

Petitioner respectfully requests this Honorable Court to hold this part of the Georgia death statute unconstitutional in its application against him in order that his sentence be reduced to life in prison.

(b) By upholding the death sentence on this partial finding of an aggravated circumstance and upon the facts of this domestic killing involving powerful emotional provocation, and substantial evidence of reduced mental capacity, the Supreme Court of Georgia has adopted the open-ended construction of this seventh aggravating circumstance disapproved by this Honorable Court in Gregg vs. Georgia.

This Court in Gregg vs. Georgia, 49 Lawyers Addition 2nd 859 (1976) responded in part to the attack on the breadth and vagueness of the seventh aggravating circumstance as follows:

> "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a Defendant to death when the only statutory aggravating circumstance found was that of Section 7, see McCorquodale v. State, 233 Georgia 369 (1974), and that homocide was a horrifying torture murder..." (49 Lawyers Edition 2nd at 890).

The Georgia has previously indicated that it would not allow this open-ended approach:

> "Each of these cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core. See Florida's approach to a similar problem in State v. Dickson, 283 Southern 2nd 1 (1973). cited with approval of the Supreme Court of the United States and Proffitt v. Florida, 96 Supreme Court 2960 (1976)."
>
> Harris v. The State, 237 Georgia 718 at Page 733.

Contrary to this Court's expectations, the seventh circumstance has not been narrowed. Rather, the Georgia Supreme Court has, in its decision since Gregg and most clearly in this case, adopted the open-ended approach and left the provision's application to the unguided, capricious descretion of juries.

In the case subjudice, there was strong psychiatric testimony favorable to the Defendant to the effect that due to a dissociative condition, the Defendant was unable to control his actions and unaware of what he was doing. Also, the victims were his wife and mother-in-law with whom his wife was living at the time awaiting a divorce action the following day, and who had vigorously encouraged his wife to finally put an end to the marriage. There was evidence that their marital history had been stormy, highly emotional and at times violent; that his wife had committed him to Milledgeville State Mental Hospital on three previous occasions; and that there had been highly emotional arguments between them by telephone shortly before the shooting. The law has always recognized that this type of killing, where enormous

emotions and long pent up passions are finally released, are different in degree from the cold-bloodied, torture-robbery type murders of strangers involved in the cases cited by the Georgia Supreme Court in its Appendix to its decision in this case.

Because of the facts of this case, and the upholding of the partial finding of the seventh aggravating circumstance, it is absolutely clear now, if not before, that the Georgia court's application of the seventh circumstance can now be classed as too vague under the due process clause and the 8th Amendment as incorporated in the 14th Amendment, counsel submits to this Honorable Court that what one individual may reguard as vile, or horrible or inhuman, some other individual may not. These are words that are subject to a highly subjective, personal interpretation and are not objective enough to meet Constitutional objections as to vagueness, particularly where there are no further guidelines provided in the standard Georgia sentencing charge. One only has to look to various cultures of the world to see that all human beings are not in agreement on what is horrible or inhumane or vile; a practice in one culture may be perfectly acceptable there and viewed as horrible and inhumane or vile in another culture; counsel submits that the same may be true of individuals within a particular culture. Therefore, the seventh aggravating circumstance, as applied to the facts of this case, cannot withstand Constitutional scrutiny and this Petitioner's death sentence should be declared void therefor.

(c) The statutory death sentence review conducted by the Supreme Court of Georgia in this case was so superficial, and thus insufficient under this Court's expectations and Gregg, as to have violated the Petitioner's rights to the due process of law and equal protection of the law as guaranteed under the Constitution of the United States.

The Georgia mandatory appeal process was assumed in Gregg to be a necessary part of avoiding arbitrary and capricious, and thus unConstitutional imposition of the death penalty. 428 U.S. at 198 201, 220, 223.

Under the statutory scheme, the Georgia Supreme Court is under a duty, when reviewing a death sentence, to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, concerning both the crime and the Defendant; GCA 27-2537 b 3; and is required further to include in its decision a reference to those similar cases which it took into consideration. GCA Section 27-2537 e. Conversely, counsel submit that if the facts of the case subjudice are substantially dissimilar with the facts of cases cited as similar, then the sentence of death would be excessive or disproportionate and should not have been approved by the Georgia Supreme Court. For this statutory required comparative analysis, the fact of murder is necessarily presupposed, so that what must determine the issue is the manner in which the crime is committed, i.e. whether it involved torture, etc. This follows from the fact that to do otherwise where the seventh statutory aggravating circumstance is involved, would be to adopt the disapproved "open-ended" interpretation of it, and sustain death penalties where the only similarity, as here, is the fact of death and that a gun was used.

In considering this aspect of the case, the Georgia Supreme Court found as follows on Page 16 of the Slip opinion:

> "In reviewing the death penalty in this case, we have considered the cases appealed to this Court since January 1, 1970, in which a death or life sentence was imposed and we find the similar cases listed in the Appendix support the affirmance of the death penalty in this case. Robert Franklin Godfrey's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the Defendant."

The cases listed in the Appendix to the Georgia Supreme Court's opinion which are supposedly similar to the facts of this case are as follows:

> House v. State, 233 Georgia 140 (1974) where the Defendant was found guilty of strangling two seven year old boys to death after committing anal sodomy upon them; Gregg v. State, 233 Georgia 117, (1974) where the Defendant whipped, burned, bit and cut his bound victim, put salf on her wounds and sexually abused her prior to strangling her; Floyd v State, 233 Georgia 280 (1974) where the Defendant entered a stranger's home under pretext of using the telephone and killed the victim while forcing a child to witness it; Chenault v. State, 234 Georgia 216 (1975) where the Defendant killed Mrs. Martin Luther King, Sr. in a crowded church, creating great risk of death to more than one person, Section 3 aggravated circumstance; Smith v. State, 236 Georgia 12 (1976) where a couple killed the wife's former husband for the insurance money; Burt v. State, 236 Georgia 815 which was murder and armed robbery; Coleman v. State, 237 Georgia 84 (1976); Isaacs v. State, 237 Georgia 105 and Dungee v. State, 237 Georgia 218 (1976), companion cases where they entered a home for the purpose of burglary and killed six members of the family; Banks v. State, 237 Georgia 325 (1976) where the Defendant killed a strange couple in the woods under circumstances held to show torture (which was taken from the jury by the District Attorney subjudice); Young v. State, 239 Georgia 53, three murders in the commission of burglarly; Gaddis v. State, 239 Georgia 238 (1977), companion case to Burt, murder and armed robbery; Peek v. State, 239 Georgia 422 (1977), where the Defendant accosted a strange couple, murdered the man and kidnapped the one woman; Westbrook v. State, 242 Georgia 151 (1978), where the Defendant with a companion was cutting the grass at a home and kidnapped and murdered two members of the household.

Even the most superficial comparison would indicate that the cases cited in the appendix by the Georgia Supreme Court bare no real similarity to the facts of this case. This case would fall into the category of "domestic" killings committed under circumstances showing serious emotional provocation with substantial physchiatric testimony as to temporary insanity and inability of the Petitioner to form the requisite criminal intent at the time of the killings. All of the cases cited in the appendix by the Georgia Supreme Court involved murders of strangers mostly in the commission of burglaries or armed robberies. Historically, cases of the domestic sort have been accorded a different degree from those cited in the Georgia Courts Appendix to the opinion. The Petitioner also asserts in this Appeal elsewhere that he was entitled to a manslaughter charge under the facts of this case but even if it is not technically manslaughter under the strict wording of the Georgia Statute, there are certainly mitigating facts about it which distinguish it from the cases cited as similar by the Georgia Court. It is also clear that the Georgia Court did not consider the "both the crime and the Defendant", or give any consideration to this Defendants having lived a crime-free and constructive life prior to the killings. This Petitioner is not the type hoodlum and career criminal as was involved in most of the cases cited by the Georgia Court in the appendix.

In the review conducted by the Georgia Supreme Court, there was no consideration of other domestic killings where the verdict had been voluntary manslaughter or life imprisonment which had been appealed. It certainly failed to examine non-appealed capital convictions where life sentences were imposed or where capital conviction was not obtained or where by plea bargain the Defendant was allowed to plead the voluntary manslaughter to avoid a murder trial. All of these factors were assumed by this Court in Gregg to be important aspects of a thorough and meaningful sentence review in which this Court expected to be considered. What we have in Georgia now is a thoroughly standardless, uncategorized and thus meaningless sentence review.

The facts of this case, when compared with those listed in the appendix to the Georgia Courts Opinion, stand out as dissimilar in the extreme. However, if the staff of the Georgia Supreme Court had undertaken a thorough review of all those cases in Georgia where domestic killings had resulted in life sentences, convictions of voluntary manslaughter or plea bargains for voluntary manslaughter, this case, on its particular facts, would appear very similar. It would then be perfectly clear that the death sentence in this case is excessive and disproportionate to the sentences and results in cases of a similar nature. Counsel would submit that this undertaking, to show this result, would not have to go beyond the borders of Polk County, one of one hundred fifty nine counties in the State of Georgia. This Petitioner is aware of the facts of a case which occurred a few months after Godfrey's conviction in Polk County "because I represented the murdered wife in divorce proceedings pending then against her husband and killer" where the husband, the day after the temporary hearing in the matter, went to his wife's house with a gun and shot his wife through the window from outside the house where she was standing just inside a window with her boyfriend, killing her and then severely injuring the boyfriend who was shot as he crossed the yard and saved himself by entering a neighbor's back door. The killer clearly went to the house intending murder and it is a great irony that a plea bargain was allowed under the circumstances when the killer was also engaged in an ongoing adulteress relationship of long standing. This murderer was then allowed to plead guiity to voluntary manslaughter in Polk Superior Court upon the recommendation of the same prosecutor who convicted Godfrey and sentenced by the same Judge to twenty years. He will probably serve seven years at most.

This set of circumstances, which counsel submits is repeated enumerable times in this and other states, shows without question that the process by which the law deals with those charged with murder is still so fraught with capriciousness and discretionary actions at every procedural step that the death sentence cannot withstand the scrutiny of the analysis in Furman v. Georgia. In this case and generally since Gregg the manner in which the Georgia Supreme Court has conducted the required "sentence review" has rendered meaningless that "important additional safeguard against arbitrariness and caprice", 428 U. S. at Page 198, and therefore denied the due process of law as expected by this Court.

II. The dismissal of Petitioner's challenge to the constitutional composition of the Grand Jury which indicted him, and thus to the entire jury list under Georgia law, on the grounds that it was not timely filed because it was filed after the indictment was rendered, even though such filing was over a month before arraignment deprived the Petitioner of the due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Counsel for the Petitioner filed a plea in abatement seeking to quash the indictment against him on the grounds that the Grand Jury that rendered it was unconstitutionally composed was filed on January 31, 1978 and heard on February 9, 1978. The Defendant's arraignment date was March 3, 1978 and the trial March 6, 1978. Unknown to the Defendant and his counsel, Petitioner had previously been indicted on December 15, 1977 when the August Term Grand Jury had been called back in for a Special Session for the purpose of indicting this Petitioner. It was disputed as to whether counsel actually represented the Petitioner at the time the indictment was rendered.

Upon the hearing of the Motion the District Attorney moved to dismiss the plea and abatement on the grounds that it was not timely filed and cited Henton v. The State, 223 Georgia 174, and Blevines v. The State, 220 Georgia 720, as controlling precedent in the matter. The Court granted the District Attorney's motion to dismiss over various objections on the part of counsel for Petitioner.

The Petitioner submits to this Honorable Court that any procedure whereby substantial constitutional right of a criminal Defendant can be held to be waived when neither that Defendant nor his counsel have been accorded notice and opportunity to file appropriate objections, is highly suspect, and presents a serious and easily recognizable violation of the due process of law under the Constitution of the United States.

The rule in Georgia as set out in Henton and Blevines has been repeated in a long line of cases for many years without any analysis or reasoning, and that is, that a challenge to the legality of the Grand Jury must be brought before indictment. The issues in the early cases when the rule was adopted in the 1880's involved mere technicalities having to do with the drawing of jurors and the calling of jurors for service out of order, and the misnaming of jurors. Whereas in modern times since Taylor v. Louisiana, 419 U. S. 522 (1975) and other cases dealing specifically with Grand Juries, it has been established as a substantial constitutional right to have a fair cross section of the community represented on the Grand Juries and thus under Georgia Law the entire jury list from which Grand Jurors and the venial panels are chosen. Thus, Petitioner submits that the question must be answered, what substantial, compelling interest does the State have in such a rule as compared to the substantial constitutional right that criminal defendants have concerning the composition of Grand Juries and jury list?

An analysis of the early cases shows clearly that the state's interest in this rule is very slight and is mainly to prevent frivolous issues from being raised interminably upon the trial of cases. However in this case, the motions were made over a month before arraignment. The modern Georgia rule seems to had its inception in the case of Turner v. State, 78 Georgia 174 (1886). Turner involved the question of whether a man serving on a Grand Jury with a similar name to the man named on the Grand Jury list was the wrong person. This can hardly be said to rise to a constitutional issue and importance. Thus the reason for the rule as stated in Turner was, "the reason is, that he must fight in limine, if it makes a point arising in limine, and not wait until the bill is found true and he is arraigned and on trial before the traverse jurors."

The Turner case inturn cited Williams v. The State, 69 Georgia 11, which concerns a plea in abatement filed after indictment which alleged that "no precept has ever been issued or ordered for the summoning or attendance of jurors at this special term nor have any jurors either grand or petite been summoned or sworn under a precept as required by law". Regarding the Georgia Supreme Court's opinion of the gravity of that matter, as opposed to the present constitutional gravity of the matter sought to be raised. The Court stated on Page 27 as follows:

> "It is doubtful whether it be important to inquire about such matters at all...and if, on the trial of the criminal, all such details were opened to investigation, the trial would be interminable...if, however, it be deemed important in a particular case to fight the prosecution in limine, diligence requires that the challenge be made before the bill is found."

Petitioner submits that it is readily apparent that the genesis of the present Georgia rule was had in matters that the Court assign little importance to. Since cases recently decided by the United States Supreme Court, in Georgia cases decided thereunder, have designated the make up of the Grand Jury and venial list as involving a substantial constitutuional right, it seems that the time has come to specifically overrule the application of the Henton and Blevines holdings under the facts and circumstances

of this case. Counsel would further point out that this Court subsequently reversed Henton as subnom, Anderson and Henton v. Georgia, 390 U. S. 206 (1968), in a per curiam decision without a written opinion in which the Court merely granted the writ of certiorari and reversed the case citing Whitus v. Georgia, 385 U. S. 545. Although the reversal was not explained, Petitioner would submit that this Court has already impliedly held the rule in Henton and Blevines to be unconstitutional.

In any case, Petitioner submits that there is a line of old Georgia cases concerning pleas in abatement that specifically uphold a plea as a proper method to attack a defective Grand Jury after the true bill has been rendered, so long as it is prior to or at arraignment. Reich v. The State, 53 Georgia 73; Fennigan v. The State, 57 Georgia 427; and Tompkins v. The State, 138 Georgia 465. In Reich, the Defendant filed a plea upon arraignment alleging that one of the Grand Jurors that sat on the Grand Jury indicting him was an alien and not qualified to sit on the Grand Jury. The trial Court dismissed this plea and on appeal the Georgia Supreme Court held in part as follows:

> "There are some authorities seemingly to the effect that the challenge must be to the jury before the bill is filed; but it seems to us that this is unreasonable. How is a Defendant to know that this secret inquest is proceeding to find a bill against him? Whatever objections there may be to a Grand Juror that a party can make ought to be made on the trial and before pleading to the merits, and such, we think, was the practice in England", Reich at Page 75.

In Fennigan, a plea in abatement was filed by the Defendant at arraignment alleging that the Grand Jurors were unlawfully drawn. The trial Court sustained the State attorneys demurral and on appeal the Supreme Court of Georgia reversed holding in part as follows:

> "We do not say that if the defendant, with a full knowledge of the facts, had gone to trial without raising any objection to the indictment, that he could have taken advantage of it after verdict, but the Defendant in this case did not wait and take his chance for an acquittal until after verdict; he pleaded to the indictment on arraignment, as required...and in our judgment, the Court erred in sustaining the demurral to the defendants plea in abatement to that indictment.
>
> Whenever the State undertakes to deprive one of its citizens of his life or liberty, it is the duty of the Courts to see that it is done in accordance with the laws of the land and not otherwise. In the administration of criminal law, judicial discretion should not be tolerated. The law, as it is prescribed by the Supreme power of the State, should be the rule of conduct for the Courts as well as for the citizen."

Thus it appears that the original rule in Georgia was based on substance and due process whereas the more recent Georgia rule was adopted by the Courts as a matter of expediency in matters it considered of little importance. Petitioner submits to this Honorable Court that the procedure in the trial court in this matter violates well established principles of due process and that the whole proceeding should be reversed and declared null and void.

3.

THE COURT'S FAILURE TO GIVE A REQUESTED CHARGE ON THE LAW OF MANSLAUGHTER UNDER THE FACTS OF THIS CASE WHERE THERE WAS SUBSTANTIAL EVIDENCE OF EXTREME EMOTIONAL PROVOCATION, AND DIMINISHED MENSREA, DENIED THE PETITIONER THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

On the trial of the case counsel for the petitioner timely and in writing requested the court to charge the law of manslaughter in Request to Charge Number 20 and the trial court denied this request and counsel made appropriate objections. (TR-545)

In the Supreme Court of Georgia's opinion at Page 7, the Court held that, "there was no evidence in this case of sudden violent and irresistible passion resulting from serious provocation to warrant charging on voluntary manslaughter under Georgia Code Annotated Section 26-1102. "

The voluntary manslaughter statute in Georgia under 26-1102 is as follows:

> "A person commits voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder, if he acts solely as a result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killings sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder." (Emphasis supplied by counsel)

Petitioner submits that the testimony in the record from the defendant and from the Defendant's psychiatrist, Dr. Davis, establishes that the defendant was impelled into a dissociative state by virtue of the serious emotional impact of the second telephone call from his wife, as set out in the Statement of Facts. Petitioner submits that this psychological abnormal state is analogous to an irresistible passion and that the question of provocation was a matter to be weighed by the jury and not determined solely by the court.

The law in Georgia respecting when such a charge may be given is that on the trial of a murder case, if there be any evidence, however slight, as to whether the offense is murder or voluntary manslaughter, instruction as to the law of both offenses should be given to the jury. Banks V. State, 227 Georgia 578 at page 580.

The petitioner submits that the type of provocation which excites the irresistible passion or impulse is the question of fact for the jury to determine under appropriate guidelines as given by the court in the charge. The petitioner submits that he was substantially prejudiced, and deprived of due process and equal protection of the laws, by the removal of this option from consideration of the jurors, and the argument of counsel that could have been made to the jurors on this issue, and submits that purely emotional provocation as a basis

submits that purely a emotional provocation is recognized as a basis for manslaughter under the laws of other jurisdictions if not Georgia and thus deprives this petitioner of equal protection and privileges and immunities of the law. For instance, in California there is a non statutory voluntary manslaughter which is a homicide which may be intentional voluntary deliberate premeditated and provoked. It differs from murder in that the element of malice has been rebutted by a showing that the defendant's mental capacity was reduced by mental illness, mental defect, or intoxication. People V. Graham, 71 California 2nd at 315. This type of voluntary manslaughter was distinguished in California from involuntary manslaughter by the presence of intent to kill. Therefore, if the prosecution charges a defendant with murder in the first degree and the defense can show that due to mental disease, defect or intoxication or a combination thereof the defendant could not materially or meaningfully reflect upon his act, harbor a malice aforethought, and form a specific intent to kill, his offense could be no greater than involuntary manslaughter under California law. People V. Mahle, 10 Criminal Law Reporter 2149 (California Appeal 1971). Criminal defense techniques , Volume Two, edited by Robert M. Sipes, Pages 32-14 through 15. Also counsel for the petitioner would cite the highly publicized case in New York last year where a Yale student was visiting his alleged fiancee at her home in New York where she rejected him while at her parents home whereupon the young man murdered her with a claw hammer. At Yale defense fund was formed to support the young man because of his previous good record and upon the trial of the case, he was convicted of voluntary manslaughter.

Petitioner submits that in a matter of life and death, he should not be denied the privileges and immunities and equal protection of the laws accorded to citizens in other States in the Country and thus urges this Honorable Court to accept this question for further review.

THE SHOWING OF GRUESOME, GORY COLOR PHOTOGRAPHS TO THE JURY, WHERE THE EVIDENTIARY BASIS FOR THEIR ADMISSION WAS TENUOUS, IF NOT NON-EXISTENT, AND WAS CERTAINLY CUMULATIVE, WAS SO INHERENTLY PREJUDICIAL AS TO HAVE VIOLATED THE PETITIONER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Prior to trial in this case after viewing by counsel of the photographs in question, a Motion in Limine to exclude them from the trial was filed and heard on February 9, 1978 at which the trial court delayed the ruling until the photographs were presented at the trial. They were subsequently presented at trial and admitted over numerous and vigorous objections by petitioner's counsel that they were irrelevant, cumulative, and because of the gruesome nature would only tend to inflame the minds of the jurors against the petitioner. The objectionable photographs are in the record as State's Exhibits Numbers five, six, seven, fifteenth, and sixteen, and counsel for the petitioner is requesting the Clerk of the Superior Court of Polk County to transmit these photographs to the Court pursuant to Rule 21 (1) of this Court.

Although the photographs of victims have been held admissible in numerous cases in Georgia, there has always been some relevancy shown by the State. It has usually been an instance where the positions or the angles of the shots were important or because of the nature of the wounds were important because of some issue raised by denial on the part of the defendant. However, in this case, the defendant admitted on the stand that he must have done the killings, even though he had no recollection of the event and there was no issue whatsoever as to identification, fact of death, and cause of death, the testimony of Dr. Farrell, the medical examiner, and of Sheriff Swafford was very explicit as to the cause of death, the position of the bodies in the trailer, the nature and description of the wounds, their gruesominess and the positions of the windows, doors and angle of shots fired. Petitioner submits that none of these things were in dispute, or issues for the tryers of fact, and therefore, the photographs were not revelent to any contested issue, were merely cumulative, and intended solely and without question, to improperly prejudice the jury against the defendant in a close case involving a technical defense and therefore depriving him of a fair trial and the due process of law. The only real issue on the trial of the case at the guilt or innocent stage upon the jury had to give any serious consideration, was the state of mind of the defendant at the time the acts were committed and whether or not he was insane or able to form the requisite criminal intent.

Even though there are numerous cases in Georgia upholding the right of the State to enter these photographs, petitioner presented the following language from an opinion by the highly regarded Chief Justice Duckworth to the Georgia Supreme Court on the appeal of this case:

> "It might insure a fairer trial to exclude gruesome photographs of a slain person unless they serve a real purpose in proving the material elements of the case. Their introduction when they can serve no purpose but to show a terrible corpse is an excitement of passion against the accused, and the law should not allow a trial for life to be clouded with passion." Edwards V. State, 213 Georgia 552.

In Division Two of the Georgia Supreme Court's opinion this question was decided against the petitioner at pages 4 and 5 of the opinion wherein the Court concluded as follows:

> "We agree with the State that a criminal defendant has no right to prevent the jury from seeing the crime scene and the victim's injuries. The trial court did not err in admitting these photographs."

It is significant to note that the Georgia Supreme Court did not even attempt to suggest a valid evidentiary basis for the admission of these photographs. It merely upheld, without citation to any authority, that the jury has the right to see the victims injuries. Plain common sense tells us that photographs of this gruesome sort, particularly in a case where the defense was of such a technical nature, will inflame the jurors against the defendant and predeposed them to decide a close technical question in favor of the State contrary to the basic and fundamental constitutional rights of criminal defendants in the United States. That their introduction was intended by the State to inflame the minds of the jurors is evidenced by the fact that the District Attorney had in his possession black and white photographs of the same subject matter, from the same angles, as displayed in the Exhibits objected to on the trial of this case. The black and white photographs were not offered by the District Attorney in evidence because they by his own statement, would have been merely cumulative and repetitive.

Many of the great philosophers in history and great writers have said that in order to discover truths about human beings, one must first look inside oneself for it and then generalize it to mankind. Counsel for the petitioner had such an experience, related to the point in question, when he first saw the photographs when made available approximately a month prior to trial by the District Attorney. When counsel saw the pictures he experienced such a feeling of disgust toward the man who had done such a thing that he wondered to himself what in the world he was doing spending so much of his time, that he knew would be poorly compensated, in the defense of this man; this feeling lingered with counsel for several days. Therefore, counsel reasons that the jurors on this case, during their deliberations for approximately two hours before returning a verdict of guilty on both counts of murder could not possibly have overcome the same feelings and deliberated dispassionately, objectively, and rationally upon the highly technical defense of the petitioner. Petitioner submits to this Honorable Court this is an undeniable truth of which the Honorable Justices may take judicial notice after reviewing these photographs. Because of this, this petitioner was denied a fair trial.

5.

THE FAILURE OF THE TRIAL COURT IN ITS CHARGE ON THE SENTENCING PHASE TO SPECIFY OR ELABORATE REGARDING PARTICULAR MITIGATING CIRCUMSTANCES INVOLVED IN THIS CASE OR RELATED TO THIS PETITIONER, VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Court's brief charge on the sentencing phase of the trial of this case is set out as follows:

> "Ladies and Gentlemen of the jury, it is now your duty to return to the jury room and fix punishment in this case as to Count One and Count Two. Code Section 26-1101 (c) provides 'a person convicted of murder shall be punished by death or by imprisonment for life. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral capability or blame. Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to it injurious consequences.'
>
> In determining your verdict in this case you shall consider any mitigating circumstances which you find, and you may consider any of the following aggravating circumstances which may be supported by the evidence. That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In the event you fail to find an aggravating circumstance or circumstances beyond a reasonable doubt you would fix punishment at life imprisonment, and even though you find the existence of a statutory aggravating circumstance or circumstances, you could recommend a life sentence. In the event you determine that your verdict will be a recommendation of death, you shall designate in writing the aggravating circumstance or circumstances which you found beyond a reasonable doubt.
>
> Now, this charge that I have given you is typed and is to be sent out with you. You may refer to it to guide you in your deliberations. I also have prepared two verdict forms, one as to Count One and one as to Count Two. Again these forms in no way should intimate or suggest to you what your verdicts should or should not be. Your verdict is entirely up to you. It must be unanimous, all twelve of you must agree to your verdict, take into consideration all of the previous charge which I have given you. You may return to the jury room to deliberate as to punishment as to Counts One and Two." (TR-578-579)

Petitioner would point out that in the District Attorney's statement to the Court, before the jury on his argument on the sentencing phase both torture and aggravated battery were completely withdrawn from the consideration of the jury as a part of the aggravating circumstance. (TR-570,571)

Petitioner submits that the charge given by the trial court on the sentencing phase was insufficient as a matter of law and did not fully explain to the jury their options and the results of certain actions the jury could have taken. Counsel submits that the charge was improper and biased in that, whereas specific aggravating circumstances were set out, nothing but a general reference to mitigating circumstances were set out, and no mitigating circumstances in particular were enumerated by the judge to allow the jury to be aware of what might be considered by them in weighing same against the aggravating circumstances in order to determine whether a life sentence should be granted rather than the death penalty as was clearly anticipated by this Court in Gregg V. Georgia, and its campanion cases. The constitutionality of the jury instructions approved by the Georgia Supreme Court on this question is presently before the Court in AlphonsoMorgan V. State of Georgia, Number 78-6140, October Term, 1978 and petitioner adopts the arguments made therein and the supporting data attached thereto by Appendix.

Petitioner further submits that when the defense of insanity has been raised, and such competent evidence supporting the contention has appeared as in the record of this trial, the Court is under a duty, whether or not requested, to charge the jury that psychiatric testimony concerning the diminished capacity of the defendant, even though not rising to the level of insanity, should be considered by the jury as a mitigating circumstance. Petitioner submits the Court should also have indicated to the jury that it could consider his character and previous life without criminal record as a mitigating circumstance.

Petitioner further submits that the Court should have charged, whether or not requested, that in the event that any single juror, by his opinion reached independently could not be convinced beyond a reasonable doubt that the death penalty should be imposed, then that would mean that the jury could not reach a verdict on the issue and as a matter of law, the Court would have to impose the life sentence. In capital cases such as this one, petitioner submits that the trial court has an obligation to explain to the jurors that each juror, independently, has the power of life and death, and that each juror should not give up his or her individual conviction in order to agree with other jurors. Therefore, petitioner submits that he did not receive the informed, individual, and independent judgment of each juror and was substantially prejudiced thereby. Hawes V. State, 240 Georgia 327; Fleming V. State, 240 Georgia 142; and Jureck V. Texas, 428 US 262, 271 (1976).

6.

THE TRIAL COURT'S FAILURE TO GIVE THE DEFENDANT'S REQUEST TO CHARGE NUMBER EIGHT, WHICH TIED TOGETHER VARIOUS ASPECTS RELATING TO PROOF OF CRIMINAL INTENT, AND WHICH CONCISELY, AND LEGALLY, STATED THAT GEORGIA LAW UPON WHICH PETITIONER'S DEFENSE WAS BASED IN ESSENCE, VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Counsel for the Appellant timely and properly presented the Defendant's Request to Charge Number Eight to the trial judge. The trial court refused to give the charge and counsel made proper objection after the jury retired. The requested charge is set out as follows:

> "As I may have previously stated, the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
>
> This presumption may be rebutted by evidence that the act was due to reflex or some other involuntary influence, such as hypnosis or mental defect, which produced the action while inhibiting the actor's will. If you find from the evidence before you in this case this presumption has been rebutted by some competent evidence, then you must give careful consideration to whether or not the State has proved the mental element, or criminal intention of the crimes charged beyond a reasonable doubt.
>
> Criminal intention is an essential element of each crime charged and the burden is always on the State to prove it beyond a reasonable doubt. Therefore, under the law, a person will not be presumed to act with criminal intention.
>
> So if you find from the evidence before you that the State has not proved the mental element, or criminal intention, of the crimes charged beyond a reasonable doubt, or if you have a reasonable doubt concerning this essential element of the crimes charged, then you must acquit the defendant."

Petitioner submits that this was a valid charge and is supported in Georgia Code Annotated Sections 26-603 and 26-605 and also Grace V. Hopper, 234 Georgia 699, and Coker V. State, 234 Georgia 555; see also Wilson V. State, 9 Georgia Appeals 74. The second paragraph of the charge is suggested by the committee notes in the Georgia Code following Chapter 26-6 on Pages 88 and 89, which notes are set out in pertinent part in Appendix B hereto.

While some of this charge may have been set out in the Court's charge in various places, petitioner submits that he had a right to have this important idea in the law drawn together in one cohesive charge. Counsel submits that it is impractical to assume that inexperienced laymen can pull together such a complicated concept and see it whole when it has hinted at at various places in the Court's charge but never cohesively explained. Since the petitioner's entire defense rested on an argument like or similar to that set out in this Request to Charge Number Eight, petitioner submits that the refusal to give it was unwarranted, severely prejudiced the petitioner, and denied him due process of law and the right to a fair trial. Since the psychiatric testimony in favor of the defendant clearly conceded that the dissociative condition was non-psychotic and therefore not technically amounting to insanity under the law, the whole thrust of the defense hinged on the point made in this requested charge. Since this subtle technical idea was not reenforced to the jury and charged from the bench, it is plainly possible that the jury concluded that the defendant did not have a valid legal defense under the evidence. This is plainly a deprivation of his rights when the requested charge states valid law. For this reason this Court should grant certiorari to review this question.

7.

THE ANTIQUATED GEORGIA PRACTICE OF READING FROM GEORGIA SUPREME COURT CASES, IN THE DIRECTION OF THE JUDGE, AND IN THE PRESENCE OF THE JURY, IS SO INHERENTLY FRAUGHT WITH PREJUDICE THAT IT DENIES THE DUE PROCESS OF LAW AND THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. AND FURTHER, THE GEORGIA RULE ALLOWING SUCH A PRACTICE WAS MISAPPLIED IN THIS CASE BY ALLOWING THE DISTRICT ATTORNEY TO READ THE FACTS OF A CASE FROM A DECISION OF THE SUPREME COURT OF GEORGIA THAT WERE SUPERFICIALLY SIMILAR TO THE FACTS IN GODFREY, IN FRONT OF THE JURY, AND THEREBY VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS, FAIR TRIAL, AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES.

The law in Georgia is very peculiar and contradictory regarding the reading from the appellate decisions of the State in argument before the Court and jury in criminal cases. Counsel may read law during his argument in a criminal case either to the Court or to the jury if he thinks it applicable to his client's case. This applies to defense counsel as well as the prosecutor. Weatherby V. State, 213 Georgia 188. The argument phase of a criminal trial in Georgia on the question of guilt or innocence, or for punishment in death cases, is a peculiar bifurcated proceeding in this respect when the time for final argument to the jury arises, the District Attorney has the opening usually and proceeds to read law and argue it in the direction of the judge but in the presence of the jury. In this part of the proceeding, so long as he is directing his remarks toward the judge and not in the direction of the jury, he may read from the black letter law out of the case, as well as such facts as are necessary to understond the legal holdings; however, when he takes a few steps or turns in his place and begins to address his remarks to the jury, he may not read facts from case decisions. Georgia Code Annotated Section 24-3319 provides in part as follows:

> "Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the Court as applied thereto, in decisions by the Supreme Court or Court of Appeals."

At the beginning of the District Attorney's argument on the guilt or innocence phase of the trial in this case, Mr. Perrin began in the usual manner by reading legal definitions of murder and insanity to the Judge in the presence of the jury. Then he stated in the direction of the Judge while standing in front of the jury as follows:

> "Mr. Perrin .....now, in regards to criminal responsibility of a person who claims a defense of insanity there is a case that is as near this one as you can make two cases, the case of Reville V. State found in the 235th Volume of Georgia Supreme Court Reports beginning at Page 71. The case was tried or was decided in September, 1975, some three years ago. The law enunciated in that case is still applicable in this State today. In this case the very factual situation as existing here except there is only one killing in that case. Reville killed his wife and when the police got to his home where the killing took place.....
>
> Mr. Holmes .....we would ask that Mr. Perrin read from the law, your Honor, on the case law.
>
> Mr. Perrin ....when the police arrived the appellant surrendered to them and turned over the death weapon, saying, here's the gun, I killed my wife. The the Court said in reviewing that case, after conviction, held that from the evidence of premeditation discussed above and evidence at the trial, that the appellant had an extremely retentive memory of the events before and after the event coupled with the absence of any evidence of insanity or delusion other than the alleged loss of memory at the time of the offense, we can not say that the evidence demanded a finding of not guilty by reason of insanity. The exact case, exactly like this except for the fact that there was only one person, the man's wife, dead and he could remember nothing about the shooting or denied any memory of the shooting.".....(TR-506,507)

In its opinion the Georgia Supreme Court in Division 13 held as follows on this point:

> "The argument challenged was directed to the trial judge on matters of law. Although the jury was present, reading and arguing law is not reversible error." Potts V. State, 41 Georgia 67,75 (1978). (Emphasis supplied by counsel)

The Georgia Supreme Court ruled this way even though it had recently disapproved a similar prosecutorial tactic in Hawes V. State, 240 Georgia 327, at page 336 :

> "We do believe, however, that the remarks by the District Attorney were improper. It would not have been improper for the District Attorney merely to have expressed to the jury the sentiments embodied in the quote from Everhart, supra. However, the District Attorney's attribution of those sentiments to a Justice of this Court with the object of influencing the jury to impose the death penalty was improper and is disapproved. See Croom V. State, 90 Georgia 430."

The District Attorney's brief to the Georgia Supreme Court argues, and the Court apparently relied upon it, that it is proper to relate the facts of a case which are necessary to explain the principle of law decided, and cites Potts V. State, supra, as well as Cribb V. State, 118 Georgia 316. However, petitioner would submit to this Honorable Court that these cases and the exception carved out there are inapplicable to the facts of this case. This follows from the fact that the portion of the Reville case read in front of the jury by the District Attorney in this case states no principle of law whatsoever, but only the facts of the case, very similar to the facts sub judice, and only expressed the Court's opinion on those facts to the extent that the evidence so stated could not be said to demand a finding of not guilty by reason of insanity. This is no principle of law such as we see in the Potts case. In Potts, the case which the Assistant District Attorney was there allowed to recite the facts of, Krist V. State, 227 Georgia 85, dealt with questions regarding venue as applied to a situation where aspects of a continuing criminal enterprise occurred in different jurisdictions. Obviously, a complicated principle of law for laymen to understand without the concrete factual situation also related. Also, the Cribb case in addition to allowing the limited exception to the general rule upon which the State relied, stated as follows:

> "Counsel can not indirectly introduce evidence by reading statements of fact contained in published reports of this or any other court. If it appears that the reading is for the purpose of establishing facts which might influence the jury, it would be the duty of the judge, on objection, to prevent the same. Evidence which in one case produced a given result can afford no guide to a jury on the trial of another. A verdict in one case is no standard of what should be done and what may be argued to be a similar case."

Clearly, the District Attorney read no law to the trial judge, in the presence of the jury; only facts which were obviously intended to prejudice the petitioner's case before the jury. All competent Georgia trial lawyers know the purpose of reading such matter to the trial judge: that purpose is to educate or prejudice the jury in behalf of counsel's case or against the opponent's case. It is manifest that the trial judge in this case had no need to hear the facts of the Reville case, or even principles of law from other cases, from the District Attorney at that stage of the trial, especially since request to charge had already been submitted and ruled upon. Therefore, petitioner respectfully submits that it is a legal fiction to say that the District Attorney may read something to

directly.

Petitioner submits that this procedure against him in the trial of this case had the intended effect of, and in fact did, deprive him of his constitutional right to a fair trial before an impartial jury.

This is also another example of how the Georgia Supreme Court is failing to conduct a thorough sentence review to determine whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. GCA Section 27-2537. Counsel submits to this Honorable Court that the above statement by the District Attorney in the presence of the jury, citing the Georgia Supreme Court as having already ruled on a case like petitioner's in favor of the State could have had no other effect on a layman than to have indicated to him that the Georgia Supreme Court had already concluded that under the facts of petitioner's case he had no legal defense. Petitioner further submits that this was the exact intention of the District Attorney in reading from Reville.

For these reasons, the petitioner asserts that he was deprived of due process of law and a fair trial and urges this Honorable Court to accept this case for further review of the questions raised.

THE GEORGIA DEATH PENALTY STATUTORY SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT INCLUDE AN OPTION WHEREBY THE JURY MAY RECOMMEND A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Counsel concedes that this particular point was not argued in this fashion below. However, it is fairly comprised within petitioner's blanket allegation in his pre-trial Motion attacking the whole statutory death penalty scheme as unconstitutional. This motion was overruled by the trial court and upheld by the Georgia Supreme Court.

The essence of this argument is that the statutory death penalty scheme in Georgia sets up what is in fact a false choice for jurors to make when considering or deciding between the death penalty and a life sentence. This is so because, petitioner submits, most jurors do not believe a life sentence in Georgia is a true life sentence. It is widely believed amongst the public and therefore jurors, that a man under a life sentence in Georgia can be paroled after seven years. This was the case up until a couple of years ago when public controversy over a spate of armed robbery murders in convenience stores and the resulting policital pressure caused the constitutionally independent Georgia Board of Pardons and Paroles to change their guidelines to 13 years before the first parole consideration for a prisoner under the sentence of life imprisonment. This is widely known and debated public knowledge. Even the Chief Justice of the Georgia Supreme Court has been a central figure in this public debate in recent years arguing vigorously in favor of the imposition of the death penalty and the shortening of the appeals process allowed before the penalty is imposed.

Furthermore, public opinion polls in Georgia show that the great majority of Georgians, and I think citizens in the United States, are in favor of the death penalty. And since those opposed to it are stricken from juries, either for cause, or by discretionary strikes by prosecutors, the jury panels that ultimately decide between death and life sentences are predisposed toward the death penalty. Therefore, in a close case, such as this one, a jury, favoring the death penalty in theory, is in fact making a choice between the death sentence and a sentence of 13 years. This view simply recognizes the true reality of the situation in Georgia, and probably other states as well.

If this reality is accepted, then it becomes clear that the statutory death penalty scheme in Georgia, in fact, improperly favors if not encourages the imposition of the death penalty. Under the aggravating circumstance section B(7) in particular, as applied by the Georgia Supreme Court, this deprived the petitioner, and those similarly situated, of his constitutional rights to due process of law and a fair trial before an impartial jury.

Petitioner submits that the underlying public policy consideration in this area is that society in general, for its self protection and peace, is entitled to have certain persons, who have been convicted of certain designated crimes, permanently separated or removed from the society of law abiding citizens. The true question, which brings due process considerations into play, is in what manner does society accomplish this permanent separation, i.e., by killing the offender by law or by permanent incarceration without possibility of a parole? Either option would satisfy the societal goal, however, a sentence of life imprisonment under present Georgia law would not accomplish the goal of permanent separation from society. Petitioner submits that the true life sentence is the preferred manner of enforcing this societal goal because, on the one hand, the death penalty, aside from moral considerations, is not preferrable because it concedes the right to the State to take life under circumstances where the entire society is not threatened, as in war; there is the further possibility that at some future time the State might use the death sentence against a political opponent and thus endanger the civil liberties of all the people. Whereas, on the other hand, the true life sentence accomplishes the goal but recognizes that judicial procedures are not perfect, and that an innocent man might be convicted. The expense of permanent incarceration, though not very great relatively, should not properly be weighed in such policy considerations. Thus the death penalty, as the more drastic of the two equally efficacious methods of attaining the societal goal is, because of its very final nature and incurably capricious application, an unjustifiable act of pure revenge; and thereby unconstitutionally cruel under the Eighth Amendment to the Constitution of the United States.

Because in Georgia, the ultimate sanction of permanent removal from society can only be accomplished by a death sentence, the Statutory Scheme is fatally defective and deprived this petitioner, and all those similarly situated, of the due process of law as guaranteed in the Constitution of the United States.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

RESPECTFULLY SUBMITTED,

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APPOINTED ATTORNEYS FOR PETITIONER

APPENDIX A

Opinion of the Georgia Supreme Court

Robert Franklin Godfrey V. The State,

234 Georgia 302 (1979)

THE OPINION CAN BE FOUND
IN THE PRINTED APPENDIX VOLUME.

APPENDIX B

Committee Notes to Chapter 26-6

of Georgia Code Annotated

a part of the crime but is simply a consequence of its commission." Jenkins v. State, 14 Ga. App. 276, 80 S. E. 688 (1914).

Under former law, an indictment was sufficient to support a conviction under a Code section which did not prescribe a punishment (e.g., former § 26-2629). See Kimbrough v. State, 101 Ga. 583, 29 S. E. 39 (1897). When this happens, the convict cannot be punished by fine or imprisonment, because no such punishment is provided by law. Jenkins v. State, 13 Ga. App. 695, 79 S. E. 861 (1913); nor can he be indicted and convicted under another Code section (which provides a punishment) for the same conduct. Jenkins v. State, 14 Ga. App. 276, 80 S. E. 688 (1914).

26-602. Misfortune or Accident Not a Crime.—This section revises and brings forward former Ga. Code Ann., § 26-404, "Misfortune or accident as affecting liability," to follow the definition of crime. Section 26-601 now states what is a crime and § 26-602 states what is not a crime. Furthermore, as both §§ 26-601 and 26-602 refer to "intention," former Ga. Code Ann., § 26-202, "Intention, how manifested," logically follows, revised as §§ 26-603, 26-604, and 26-605. The caption of the section was changed simply to be more specific.

Former Ga. Code Ann., § 26-404 stated that a person "shall not be found guilty of any crime or misdemeanor committed by misfortune or accident. . . ." Since the purpose of this section was to excuse from criminal liability one who, without "evil design," criminal intention or negligence, acts or omits to act, the language was changed to state simply that such conduct is not a crime. The elimination of the implied distinction between "crime" and "misdemeanor" was explained in the comment on § 26-601, ante.

The phrase "evil design," as used in former Ga. Code Ann., § 26-404, apparently has not been defined in the statutes or cases, but probably refers to that state of mind which makes one criminally responsible for even those consequences of his undertaking which were not specifically intended. For example: death resulting from the firing of a gun used in the perpetration of a robbery is criminal homicide even if the robber did not intend to pull the trigger and was not negligent in doing so (Lynch v. State, 207 Ga. 325, 61 S. E. 2d 495 (1950); Solesbee v. State, 204 Ga. 16, 48 S. E. 2d 834 (1948)); death resulting from a wound inflicted in making an unlawful arrest is involuntary manslaughter (Griffin v. State, 183 Ga. 775, 190 S. E. 2d (1937)). Section 26-602 employs the words, "criminal scheme or undertaking" to express the same idea more clearly.

The requirement of former Ga. Code Ann., § 26-404 that a party to be excused on the ground of misfortune must have had no "intention, or culpable neglect" is preserved in § 26-602. "Criminal negligence" was substituted for "culpable neglect" so as to be consistent with the language used in § 26-601.

26-603. Acts Presumed to be Wilful.—This is a new section, although based upon former Ga. Code Ann., § 26-202, "Intention, how manifested," and the case law which developed thereunder. The section provides a guide for the jury in finding the existence or absence of that concurrence of act (or omission to act) and intention which is referred to in §§ 26-601 and 26-602. The section states a well-established principle, i.e., that a person is presumed to intend to do that which he in fact does. The presumption may be rebutted by evidence that the act was due to reflex or some other influence, such as hypnosis, which produced the action while inhibiting the actor's will. The presumption applies, as in former Ga. Code Ann., § 26-202, only to the acts of a person of "sound mind and discretion." This means, of course, a person legally sane and within the age of criminal responsibility, as defined elsewhere in the Code. See Chapter 26-7.

the intention to act and the intention to cause criminal consequences. This distinction is discussed further in the comment on the following sections.

26-604. Consequences Presumed Intended.—This section also is based upon former Ga. Code Ann., § 26-202 and the case law which developed thereunder. It also is a rule for the guidance of the jury in finding the presence or absence of that "intention" referred to in § 26-601. The presumption is raised only as to persons of "sound mind and discretion," as explained in the comment on § 26-603. The rule is of ancient origin and established usage in Georgia. Loach v. City of Lafayette, 19 Ga. App. 639, 645, 91 S. E. 1057 (1917). This section, with § 26-603, should make it clear, as former Ga. Code Ann., § 26-202 did not, that only the natural and probable consequences of wilful acts are presumed to have been intended, and that even this presumption may be rebutted. Neither unforeseen consequences, nor possible consequences which did not in fact occur, are presumed to have been intended. Thus one who operated an automobile in a negligent manner, but not under circumstances of obvious danger to others, would not be presumed to intend to kill or injure another. The contrary was possible under existing law. Dennard v. State, 14 Ga. App. 485, 81 S. E. 378 (1914); Easly v. State, 49 Ga. App. 275, 175 S. E. 23 (1934).

This section, with § 26-603, reveals, as former Ga. Code Ann., § 26-202 did not, the dual nature of the mental element of crime. That is, (a) that one's physical movements (acts) may or may not have been wilful and (b) the consequences of those movements (acts) may or may not have been intended to occur. But the presumption in each instance is as stated in these sections.

26-605. Intention a Question of Fact.—This section completes the clarification of the nature of the mental element of crime. Some wilful acts are criminal in themselves (e.g., "Any person who shall stab another . . . shall be punished. . . ." former Ga. Code Ann., § 26-1701), the law presuming the intention to act from the act itself. See § 26-603 and comment, ante.

Other crimes consist of both an act and a consequence (e.g., murder is a wilful act which causes death), the law presuming the intention to cause the consequence if it is a natural and probable result of a wilful (or criminally negligent) act. See § 26-604 and comment, ante.

Another class of crimes are those in which more than an act or an act plus its consequences is required. For example, the acts of taking and carrying away the personal property of another may be wilful acts which naturally and proximately result in depriving the owner of his property, but without the additional element of "criminal intent" or "mens rea"—in this case "animus furandi," the intent to steal—there is no crime. Former Code § 26-2602; Musgrove v. State, 5 Ga. App. 467, 63 S.E. 530 (1908). Section 26-605 makes it clear that such an intention will not be presumed to have existed, but may be found as a fact only after a consideration of all the circumstances surrounding the act for which the accused is prosecuted.

The Criminal Code section makes no change in former law, merely codifying the only method by which criminal intention may be established. See Jackson v. State, 116 Ga. 578, 42 S. E. 750 (1902); Mundy v. State, 59 Ga. App. 509, 1 S. E. 2d 598 (1939). It emphasizes, as former Ga. Code Ann., § 26-202 did not, that the process of ascertaining mens rea or criminal intention cannot be reduced to a simple formula or presumption, but must entail a careful evaluation of all relevant circumstances. See Heughan v. State, 82 Ga. App. 640, 61 S. E. 2d 685 (1950).

CHAPTER 26-7. RESPONSIBILITY

APPENDIX C

Opinion of the Georgia Supreme Court

Kermit Elmer Holton V. The State

243 Georgia 312 (1979)

WE REGRET THAT THE LAST FEW LINES OF EACH OF THE FOLLOWING PAGES WERE NOT OF BETTER PHOTOGRAPHIC QUALITY.

Appendix C

Now 243 Ga 312

In the Supreme Court of Georgia

Decided: MAR 06 1979

34272. KERMIT ELMER HOLTON v. THE STATE.

HILL, Justice.

This is a death case.

Kermit Elmer Holton was indicted in DeKalb County in May, 1977, for armed robbery, burglary, and the murders of Clayton D. Pickrel and Helen S. Pickrel. The jury was instructed to find him not guilty of armed robbery. The jury found him guilty of burglary and the two counts of murder and imposed death penalties for both of the murders. As to the burglary, the trial court entered a judgment of not guilty notwithstanding the verdict on the ground that the State had not proved an entry without authority. The case is before this court on direct appeal and for review of the death penalties.

The evidence showed that the DeKalb County police answered a call from a neighbor of the Pickrels on March 4, 1976. The neighbor had been able to see Mr. Pickrel's body through a curtained den door after dark because a light was on in the den. The police forced their way into the home, where they found Mr. Pickrel lyi[illegible] face [illegible] in the den with a small cargo [illegible]

covering his head. There was evidence from which the jury was authorized to find that Mr. Pickrel died of a gunshot wound fired from a hand held .22 caliber weapon from a distance of 10 to 22 inches. Additionally, his left ear had been lacerated and he had sustained a severe abrasion to his left shoulder. These wounds apparently were caused by blows from a tomahawk, which was found with a broken handle in the den. The tomahawk could have been broken by the blow to Mr. Pickrel's shoulder since considerable force had been applied. Additionally, a spear had been thrust through the sofa in the den. The spear too was broken.

Mrs. Pickrel's body was found lying face down in the hall. She had died of gunshot wounds to her head and chest, inflicted by a .22 caliber weapon. Her head was also covered with a piece of carpet. Mrs. Pickrel had been stabbed twice in the back, apparently after she had died, with a kitchen steak knife which was found broken into two pieces at her shoulder. Her ear had been almost severed, probably by either the tomahawk or the knife. A doctor from the State Medical Examiners Office testified that in his opinion the wounds suffered by the Pickrels had probably been inflicted by a right-handed person.

Because the thermostat in the house was set at 80 degrees, the elevated temperature had caused rapid deterioration of the

bodies, making it difficult to determine the times of death. It was estimated, however, that they died about 20 hours earlier, sometime during the evening of March 3. The Pickrels had last been seen alive on the evening of March 2, when they entertained friends for dinner. Mrs. Pickrel had told their guests that evening that a former employee was in town and had nearly joined them for dinner.

The Pickrels' home had been ransacked and searched. Several items, including a camera, a television set, 2 diamond rings, a sander, and several items of silver, were missing. No unidentified fingerprints were found. Cigarette stubs of the same brand as that smoked by the defendant were found.

In May, 1977, Melinda Harris contacted the Lake County Sheriff's Office in Tavares, Florida, with information about the murders. DeKalb County police officers travelled to Florida where they interviewed Melinda Harris and taped her statement. She later testified at trial that on March 4, 1976, the defendant came to Florida to see her, bringing in his car a Sony television, a silver service, a sander and a mink stole with the initials "HSP". All of those items were identified by the Pickrels' children as having belonged to their parents. She also testified that the defendant told her that he had killed an

elderly man and woman--the man by hitting him in the head with a tomahawk and spearing him in the chest, the woman by shooting her in the head. He also told her that he had turned the thermostat "all the way up." Certain of this information had not been released to the press, e.g., the use of the tomahawk and the identity of the stolen items. In her statement Melinda Harris had said that many of the stolen items had been pawned in Las Vegas but that the defendant's sister had the silver service.

Following the interview with Melinda Harris, an investigator with the homicide section of the DeKalb County Police Department arrested the defendant in Savannah on May 21, 1977. Pursuant to a search warrant, he entered defendant's motel room where he found a number of bullets of the same caliber and manufacture as bullets found at the Pickrel murder scene and a checkbook of defendant's in which were written the Pickrels' name and telephone number. As Ms. Harris had said, the defendant's sister had the silver service.

The defendant testified at the trial; he admitted that he had formerly worked for the Pickrels, denied killing them, denied leaving the stolen articles with Melinda Harris, claimed Melinda told him she bought the stolen items at a flea market, and that he had been in Florida at a family barbeque at the time of the

murders. He also stated that he was left-handed. Members of his family corroborated parts of his testimony.

The verdicts of guilty were substantiated by the evidence. Although not required to be, Ms. Harris's testimony was sufficiently corroborated. Moore v. State, 240 Ga. 210 (1) (240 SE2d 68) (1977).

1. Defendant's first enumeration of error is that the trial court erred in finding that Melinda Harris was not his common law wife, and in overruling his motion in limine by which he sought to prevent her from testifying. Melinda Harris filed a pre-trial motion claiming to be the defendant's wife and declaring her intention not to testify at the trial. The defendant then moved to exclude her testimony, asserting his privilege as to confidential communications. After an evidentiary hearing, the trial court denied the motions. Whether Melinda Harris was the defendant's wife and thus entitled to claim the marital privilege of Code Ann. § 38-1604 was a fact question to be determined by the court. Where, as in this case, the extrinsic evidence contradicted the testimony of the two principal witnesses, the trial court was authorized to find that no common law marriage existed. Cyrenius v. State, 239 Ga. 497 (1) (238 SE2d 50) (1977); Johnson v. State

232 Ga. 61 (5) (205 SE2d 190) (1974). For example, each of them from time to time had signed papers and made statements showing each to be single and much of their time together had been spent in states which do not recognize common law marriage.

2. Defendant's second enumeration of error is that the trial court erred in not granting his motion to compel disclosure and notice to produce with regard to the pre-trial statements of Melinda Harris. Pursuant to defendant's motions, the trial court conducted an in camera inspection of the State's file and ordered that certain material be provided to defendant. He declined, however, to order production of Melinda Harris's statement. We have reviewed the statement, which is in the record. (The statement became available to the defendant when Melinda Harris was examined by use of its contents.) Defendant argues that the statement was material and exculpatory because it provided a basis to challenge the credibility of the State's main witness, Melinda Harris. In her statement she related that she had informed a Las Vegas investigator, whose name she did not recall, of the murders. Defendant argues that this revelation is inherently suspicious because it presents [illegible] failed to follow up on this [illegible]. He further asserts that

could have successfully attacked Melinda Harris's credibility by locating the investigator and establishing the falsity of the report. We find this somewhat attenuated argument is not sufficient to establish that the statement at issue was material or exculpatory under the Brady doctrine, Brady v. Maryland, 373 U. S. 83, 87 (83 SC 1194, 10 LE2d 215) (1963). Furthermore, production was not required by Rini v. State, 235 Ga. 60 (1) (218 SE2d 811) (1975). Although Melinda Harris was a key witness for the State and her credibility was an important factor, her testimony was corroborated by a wealth of physical evidence and the alleged misrepresentation in her statement does not tend to show that the defendant was not guilty or should be given lesser punishment. Nor was defendant entitled to the statement under Brown v. State, 238 Ga. 98 (231 SE2d 65) (1976). This court has held that "[S]tatements of witnesses in the prosecutor's files (nothing more appearing) may not be reached by Code Ann. § 38-801(g)." Stevens v. State, 242 Ga. 34 (1) (SE2d) (1978).

3. Defendant's third and fourth enumerations of error concern his second motion to suppress. Defendant's initial motion to suppress was filed on October 5, 1977, and related to items seized from his sister's home, namely the stolen stereo [illegible]

That first motion to suppress was considered and overruled during the three days set aside to entertain over a dozen pre-trial motions, October 17-19, 1977. Subsequently, on Thursday afternoon, November 3, 1977, defendant filed a second motion to suppress items seized from his motel room on or about May 20, 1977. The trial began, as scheduled, on Monday, November 7, 1977. On November 8th following argument by counsel on the merits of this motion, the trial court denied the motion, finding that it was "not timely filed and dilatory in nature." The motion sought suppression of the evidence obtained on May 20, 1977, from defendant's motel room and from his person on the ground, among others, that the affidavit supporting the search warrant was defective. Although the prosecuting attorney stated that the defendant was necessarily aware of the warrant because a copy was left with him on that date, defendant's attorney stated that that was not the case as his client was already under arrest. This was later corroborated by the police officer who conducted the search of the motel room when he testified at trial that the defendant was not present at the time because he was already under arrest.

The record shows, however, that at the time of the hearing on [illegible] at [illegible]

[illegible] of certain of his property seized. At the October 17 hearing, the prosecuting attorney pointed out that the defendant's attorney had viewed all of the State's evidence that was being held in the DeKalb County Police Department's property room but had not viewed the evidence at the State Crime Lab, which included "bullets, a checkbook with some names written in the checkbook, some blood samples, and possibly some towels from the scene." Thus the defendant was on notice at least no later than October 17, 1977, both that his motel room had been searched and evidence seized, and that the evidence which he now complains of (the checkbook and bullets) was in the State's possession. The only thing defendant's counsel allegedly was not aware of was the fact that the room was searched pursuant to a warrant. No motion to suppress as to the motel search based upon a warrantless search, or defective warrant search, was made prior to November 3, 1977. In sum, we cannot find that the trial judge abused his discretion in ruling the second motion to suppress, brought nearly on the eve of trial, dilatory. Thomas v. State, 118 Ga. App. 359 (2) (163 SE2d 850) (1968), cert. denied, 394 U. S. 943 (1969).

4. Defendant's remaining enumerations of error are addressed to the imposition of the death penalty.

According to law, Code Ann. § 27-2534.1(c), the jury was instructed that if its verdict be death, it must designate in writing (signed by the foreman) the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury was instructed that it should consider as aggravating circumstance whether the murders were outrageously or wantonly vile, horrible or inhuman in that they involved depravity of mind or aggravated battery to the victims.[1/]

The jury fixed the punishment on both counts of murder as death "by reason of depravity of mind." This is only a part of a statutory aggravating circumstance. It omits all reference to the words "outrageously or wantonly vile, horrible or inhuman." See Code Ann. § 27-2534.1(b)(7). See also Ruffin v. State, #33865 decided January 24, 1979; Godfrey v. State, #34256 decided 2-27-79.

/1/ The assistant district attorney conceded that the word "torture" should be omitted as there was no evidence of torture before the deaths occurred. The court also instructed the jury as to the definition of aggravated battery. [illegible] instructed them that they could not find an aggravating [illegible] to Mrs. Pickrel. [The State did not rely on [illegible] to obtain the death penalty. [illegible] 2-27-79.... P. 21.]

It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346) (1972); i.e., such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case. See Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). Here, however, although the jury was polled, the defendant did not object to the form of the verdict at the time of its return. Because there is to be a resentencing trial (see below), this problem should not arise again.

5. In the order denying defendant's motion for new trial, citing Spivey v. State, 241 Ga. 477 (2) (246 SE2d 289) (1978), the trial court recognized "that the pre-sentence charge did not comply with the decisions of the Supreme Court. . . ." Because of the lengthy pre-trial and trial proceedings, however, the trial court declined to order a new trial on sentencing, pending a review by this court of the guilt-innocence proceedings. Likewise, the district attorney [illegible]

failing to adequately charge on mitigating circumstances and in failing to make clear to the jury that they could recommend a life sentence even though they found a statutory aggravating circumstance. Spivey v. State, supra; Lamb v. State, supra; Bowen v. State, 241 Ga. 492 (3) (246 SE2d 322) (1978); Burger v. State, 242 Ga. 28 (10) (SE2d) (1978); Stevens v. State, 242 Ga. 34 (7) (SE2d) (1978); Harris v. Hopper, #34567 decided February 27, 1979.

The convictions of the defendant for murder are affirmed. The sentences of death for murder are set aside, and a new trial is allowed on the issue of punishment for those offenses.

Judgment affirmed in part and reversed in part. All the Justices concur, except Hall J. who concurs in Divisions 1, 2, 3, 5 and the judgment.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner

vs.

THE STATE OF GEORGIA,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI FILED JUNE 25, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 15, 1977:	Indictment for murder (two counts) and aggravated assault returned and filed in the Polk (Georgia) Superior Court.
February 23, 1978:	Petitioner's motion to dismiss indictment on the ground that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and that the procedure for the imposition of the death penalty set out in Ga. Code Ann. §§ 26-1101, 26-3102 and 27-2534.1 amounts to a denial of due process and equal protection of the law.
March 3, 1978:	Petitioner arraigned and enters a plea of not guilty.
March 6, 1978:	Petitoner's trial in the Superior Court of Polk County, Georgia, commences.
March 9, 1978:	Petitioner found guilty as charged in the bill of indictment and sentenced to death on two counts of murder and ten years for aggravated assault.
March 13, 1978:	Sentences of death by electrocution and ten years for aggravated assault filed with the Superior Court of Polk County, Georgia.
March 20, 1978:	Motion for a new trial filed with the Superior Court of Polk County, Georgia.
August 22, 1978;	Superior Court of Polk County, Georgia, denies Petitioner's motion for a new trial.
September 21, 1978:	Notice of appeal filed in the Polk Superior Court.

February 27, 1979:	Judgment affirmed by the Supreme Court of Georgia.
March 27, 1979:	Petitioner's motion for rehearing denied by the Supreme Court of Georgia.
June 25, 1979:	Petition for writ of certiorari filed in the Supreme Court of the United States.
August 14, 1979:	Application of Petitioner for stay of execution and enforcement of sentence of death granted by Supreme Court of the United States.
October 9, 1979:	Petition for writ of certiorari granted by the Supreme Court of the United States.

GEORGIA, POLK County.

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors selected, chosen and sworn for said County, to-wit:

1. W. F. Brittle FOREMAN	
2. Q. Leon Morris	13. M C Stringer, Jr.
3. David L. Lester	14. W M Moss
4. Claude Alexander	15. —
5. Donald M. Hooper	16. Earl S. Simpkins
6. Dorian C Mobley	17. Thomas B. Pettit
7. Mrs. Fay C. Harbison	18. Mrs. Van H. Hunt
8. —	19. James Harvey McClendon
9. W. H. Hicks	20. Mary Ann Moss
10. Andrew M Bannister	21. Mrs. D H Condra
11. Homer F. Arrington	22. Mrs. Charles E. Pinkard
12. Cleo L. Berzett	23. Bobbie Daniel Bennett

In the name and behalf of the citizens of Georgia, charge and accuse

ROBERT FRANKLIN GODFREY

hereafter referred to as the accused, of the County and State aforesaid with the offense of

MURDER

for that accused on the 20 day of September, in the year of our Lord Nineteen Hundred and seventy seven, in the County aforesaid, did then and there, unlawfully with malice aforethought and while making an assault upon the person of Mildred Godfrey with a deadly weapon, the same being a shotgun, cause the death of the said Mildred Godfrey, by shooting her with said shotgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT TWO

And, the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said ROBERT FRANKLIN GODFREY, hereinafter referred to as the accused, with the offense of MURDER, for that the said accused on the 20th day of September, 1977, in the County aforesaid, did then and there unlawfully with malice aforethought and while making an assault upon the person of Chessie C. Wilkerson with a deadly weapon, the same being a shotgun, cause the death of Chessie C. Wilkerson, by shooting her with said shotgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT THREE

And, the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said ROBERT FRANKLIN GODFREY, hereinafter referred to as the accused, with the offense of AGGRAVATED ASSAULT, for that the said accused on the 20th day of September, 1977, in the County aforesaid, did then and there unlawfully make an assault upon the person of Tracy Godfrey with intent to murder the said Tracy Godfrey, and did then and there intentionally cause physical harm to Tracy Godfrey by striking her about the head with a shotgun-rifle barrel and blunt object,

contrary to the laws of said State, the good order, peace and dignity thereof.

Polk Superior Court

August Term, 19 77

John T. Parsons Prosecutor.

(Assistant) District Attorney

SPECIAL PRESENTMENT

WITNESSES FOR THE STATE

Otbie Thaxton
J. M. McLendon
Seals Henshaw
Hoyt Dingler
Seals Swafford
Dr. Robert A. Farrell
James Sanders
Ronnie D. Dobson
James Walch
J. N. Haney
Chris Wolfe
C. Rice
Ricky Venable
Cathy Venable
Tracy Godfrey

The Defendant

Robert Franklin Godfrey

Georgia, Polk County.

Clerk's Office, Superior Court

Entered on Minutes No. 113 Page 419

This 10 day of August 1978

[illegible] Clerk

District Attorney

Defendant's Attorney.

March 3, 1978

526

D. P. No. 1946

CASE No.

POLK Superior Court

AUGUST Term, 19 77

THE STATE

vs.

ROBERT FRANKLIN GODFREY

MURDER (TWO COUNTS) and

AGGRAVATED ASSAULT

A True Bill

Foreman

District Attorney

Returned into open Court, by Grand Jury, this

15 day of December 1977

Clerk

SPECIAL PRESENTMENT

Recorded in Indictment Records

No. 1 Page 526-527

This 15 day of Dec 19 77

CLERK

We, the Jury, find the defendant _____ guilty.

This the _____ day of _____, 19____

_____ Foreman.

IN THE SUPERIOR COURT OF POLK COUNTY, GEORGIA

No. 1946

STATE OF GEORGIA

v.

ROBERT FRANKLIN GODFREY

EXCERPTS FROM TRIAL TRANSCRIPT - March 6-9, 1978

TESTIMONY OF DENNIS NEWBY

DIRECT EXAMINATION

BY—MR. PERREN

* * * * *

Q Where was that located with reference to your house?

A The trailer is right to the left of mine, about thirty feet.

Q From yours?

A Yes sir.

Q Where did Ricky Venable and Cathy Venable live?

A In the house right in front of my grandmother's trailer.

Q Now, did you have an occasion on the 5th day of September to go down there when there was some trouble between Mr. and Mrs. Godfrey?

A I went up there one day but I don't know whether it was the 5th or 6th, or what day.

Q How long was it before Mrs. Godfrey was killed?

A I was up there several different days, it could have been a week or two weeks.

Q All right. Now, on that occasion what did you do when you went to the Godfrey residence?

A Talked to Mildred and Bob.

Q And what were they doing?

A Apparently they were having an argument. They was in the bathroom.

Q And did you see either one of them at that time?
A No. I just called their names and they answered.
Q Where were you?
A In the bedroom.
Q And after you had called their names and they answered what did you do?
A They said they'd be out in a minute and I stepped back in the hall and into the living room and then Bob came on in there and Mildred came in there a little bit later.
Q All right. When they came in there what, if anything, did you notice as you saw them?
A Well, Bob was mad and Mildred was scared and that's about all I noticed.
Q Did you pay any attention to Mildred Godfrey's clothing at that time?
A Not real particular, not nothing noticeable.
Q Now, who was there other than you at that time?
A Tracey, and I believe Cathy was. Billy came up later.
Q Billy Godfrey?
A Right.
Q Do you remember whether or not Billy's wife Geraldine came up there?
A No, she didn't.
Q Now, at that time how long did you stay there at the Godfrey house?
A Approximately thirty minutes.
Q Did you have any conversation at that time with Mr. and Mrs. Godfrey?
A Yes.
Q What was the nature of the conversation that you had with them?
A Well, it was in relation to buying the property.
Q And what property was that?
A Bob and Mildred's residence.
Q Now, was there any discussion between them while you were present as to whether or not they had had a fight of any kind at that time?
A Well yeah, they argued some while I was there.
Q And what was said, if you recall, between them?
A Mildred and Tracey was going to leave and he didn't want them to leave.
Q What did he tell them about her wanting to leave with Tracey?

A He told Mildred he'd cut her if she left.
Q And did you observe at that time whether or not he had any knife?
A A pocket knife.
Q Where was the pocket knife?
A In his hand.
Q Can you tell us whether that knife was open or shut?
A He opened it.
Q And when he opened the knife there what did he say?
A He told her to set . . . she was on the couch and she stood up and he told her to set back down or he'd cut her.
Q And when he told her that what did she do?
A She set back down.
Q Now, do you recall, Mr. Newby, what kind of clothes Mildred Godfrey was wearing at that time?
A No sir.
Q Did you notice whether or not any of her clothing was cut at that time?
A I didn't notice it if it was.
Q All right. How long did you stay there?
A A good thirty minutes, or maybe a little longer.
Q And when you left what did you do?
A I went home.
Q Now, from the time that you left there did you see either one of them any more that day?
A I seen them both.
Q Where did you see them later that day?
A I seen Bob out in his yard. I believe he left in his car and then I seen Mildred, her and my grandmother left. I seen them when they left.
Q Who is your grandmother?
A Chessie Wilkerson.
Q Now, do you know who left, if anyone, with Mildred Godfrey and your grandmother, Mrs. Wilkerson?
A Tracey.
Q Now, after that time did you see Mildred Godfrey any more?
A Not until the next day I don't believe.
Q Where did you see her the next day?
A Back over at the house.
Q Did you see Robert Godfrey at that time?
A I probably did. I can't remember exactly but I probably did.
Q Do you know when they separated?

A About two weeks before the shooting.
Q And was this the same date that you're talking about?
A I believe it is.
Q All right. Now, after they separated where did Mildred Godfrey stay?
A She stayed three places.
Q Where was the first place she stayed at after the separation?
A My brother's house.
Q And that would be . . .
A . . . Monty Newby.
Q Where is Monty's house located with reference to the place where she and Robert Godfrey lived?
A It's about three miles north of us toward Rome.
Q Where did she go after she left Monty's house to stay?
A They spent, I think, one night down at my mother-in-law's.

* * * * *

TESTIMONY OF JACKIE NEWBY

DIRECT EXAMINATION

BY—MR. PERREN

* * * * *

Q And since that time where has Tracey stayed?
A With Geraldine and Billy.
Q Do you know whether or not any examination was made at that time there by the doctor and yourself as to whether or not there was a possibility of her having a concussion?
A No skull x-rays were made but he asked her if she had lost consciousness at any time.
Q Now, was she able to articulate to you at that time what had happened?
A Yes sir.
Q Do you know who the police officers were that came there, that arrived at the time you and Dennis got there?
A No, I don't
Q Now, from the time September the 5th until the night of the 20th when Mildred and your grandmother were killed had you had occasion to see Robert Godfrey at

any time during that period?
A Yes sir, I saw him several times.
Q And where, and under what circumstances, did you see him several times Mrs. Newby?
A I saw him out in his yard several times. He came to our home one time.
Q And when he came to your home do you have any idea how long that was before the shooting incident there at your grandmother's trailer?
A I don't know exactly. I'd say maybe a little over a week. I'm not sure.
Q And at that time did he engage in conversation with you and your husband or anyone there in your presence regarding the problems that he and Mildred were having?
A Briefly.
Q What, if anything, did he say?
A He came to ask my husband to sign the bond, a bond for the warrant Mildred had.
Q Did Dennis sign the bond?
A No, he didn't.
Q Now, at that time how long were you around him? That is when he came and wanted Dennis to sign the bond?
A I'd say at the most it was thirty minutes that he stayed.
Q At that time did you have an opportunity to observe him and his conduct and mannerisms and such as that, his speech and talk?
A I was in the same room with him.
Q Well, how long had you been acquainted with him?
A Approximately ten years.
Q And during that time had you seen him on a number of occasions?
A In the ten years?
Q Yes.
A Yes sir.
Q From having observed him over ten years on a number of occasions and from having seen him a short time, a week before this shooting incident occurred, and on these other occasions, did you come to some opinion as a layman and as a registered nurse as to whether or not he knew the difference between right and wrong?
A Yes sir.
Q What was your opinion about that at that time?
A He definitely knew the difference between right and wrong.

Q And from your observation of him over a period of years and having seen him on this occasion a week approximately before this shooting incident occurred did you come to some conclusion a week before the shooting incident as to whether or not he was sane or insane?

A He was very sane.

Q When you observed him there sitting in a chair when you came from your friend's house that night with Dennis and you saw the scene that you have described there in your Granny's trailer did you have, from your observation of him sitting there in the chair, did you form any opinion of what he was doing at that time as to whether or not he knew the difference between right and wrong at that time?

A I would say that he knew the difference. I did not speak to him.

Q And how long had it been prior to that time since you had last seen him?

A The day before.

Q Where did you see him the day before?

A He was out in his yard.

Q What was he doing out in his yard?

A Walking around, picking up rocks. I don't know. He was always working out in the yard.

Q Doing little ground keeping things that we all need to do around the yard?

A Right.

Q Had you . . . within a period of some two or three weeks prior to this incident on the 20th of September had you any occasion to hear him say anything or make any threats concerning Mildred?

A I did not personally hear him make any threats. I did speak with him about Mildred though.

Q What did you speak with him about Mildred about?

A He called my house and asked to speak to Dennis. Dennis wasn't there and he said "I gues you know Mildred has asked me for a divorce" and I said "yes, I have". He says, "well, I'm not going to contest it in any way, I'm not going to cause any argument", and he asked me if we wanted to buy the house, his and Mildred's house, and he quoted a price. He said "all I want out of is to pay my bills".

Q What did you tell him at that time about Mildred?

A I didn't say anything about Mildred.

Q How long was this before Mildred's death?

A Maybe a little over a week. I don't really remember.

Q Now, at that time from the conversation that you engaged in on the telephone with him, and from that conversation the pricing of the house, the discussion of the divorce and such as that, did you have an occasion to form an opinion as to whether or not at that time he knew the difference between right and wrong?

A Yes, he knew the difference between right and wrong.

Q Did you have an occasion to form some opinion at that time as to whether or not he was sane or insane?

A I had no reason to believe he was insane.

Q Well, did you form an opinion as to whether he was or not?

A He was sane.

MR. PERREN: You may examine the witness. Excuse me, just one other question.

Q When you saw Mildred there at your Granny's trailer on the evening of the 5th, Labor Day, do you recall how she was dressed?

A She had on slacks. She always wore slacks. I don't remember what color.

Q Do you recall whether or not those slacks were intact or not? If there was any damage to them that was apparent from your observation of the slacks?

A The slacks were intact that she had on when I saw her.

* * * * *

TESTIMONY OF CHARLES E. HUNT

DIRECT EXAMINATION

BY—MR. PERREN

WITNESS—MR. CHARLES E. HUNT, duly sworn.

Q Would you state your name?

A Charles E. Hunt (H U N T).

Q Mr. Hunt, where do you live?

A Cherokee Road, Polk County, Cedartown, Georgia.

Q Do you hold any office in Polk County of any of the militia districts of this county?

A Yes sir. I'm Justice of the Peace, District 1570.

Q And what area of the county is the . . . District 1570?
A Yes sir.
Q What area does it cover?
A Basically the area north of the city limits of Cedartown.
Q In your capacity as Justice of the Peace for the 1570 Militia District did you have an occasion, or have you had an occasion to become acquainted or have some contact with a Mrs. Mildred Godfrey?
A I did sir.
Q Do you recall when that was?
A I have a warrant that I issued her sir if I may refer to it.
Q Do you have the warrant or a copy?
A I have a copy sir.
Q I want to show you-a paper, a document, which has been identified as State's exhibit number one (S-1). I'll ask you whether or not you recognize that document?
A I do sir.
Q What is that sir?
A Sir, it is a warrant charging aggravated assault.
Q And when was that warrant issued?
A The 5th day of September 1977.
Q Does it show a time when it was issued?
A Yes sir. Between the hours of 6 P.M. and 7 P.M.
Q Now, at the time that warrant was issued was an affidavit made to you by some one in order to cause the issuance of that warrant?
A It was sir.
Q Who made that affidavit?
MR. HOLMES: Your Honor please.
THE COURT: Yes sir.

* * * * *

Q And for whom was the warrant you issued on September the 5th issued at the instance of Miidred Godfrey?
A Robert F. Godfrey.
Q Where were you when that warrant was issued?
A I was at the Minit Shop on North Main in Cedartown, Georgia.
Q And at that time do you recall who was with Mrs. Godfrey?
A No sir, I do not.
Q Did you have an occasion to make some observation of her at that time?

A Yes sir, I did.
Q What, if anything, did you observe about her?
A Mrs. Godfrey seemed to be in a state of turmoil, she was very upset, she was extremely nervous.
Q At that time did you have an occasion to make any observation of her clothes she was wearing?
A Yes sir, I'm sure that I observed she was wearing clothing but I could not state the condition of the clothing that she had on.
Q And what was done with the warrant when you issued it?
A Mrs. Godfrey requested that I give it to her.
Q And did you do so?
A I did sir.

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TESTIMONY OF CATHY VENABLE

DIRECT EXAMINATION

BY—MR. PERREN

* * * * *

Q Why did you feel that it would make him mad if you, his child, Dennis his cousin, or Billy his brother, came to his house?
A Because we went up there to help my mother to get out of the house and we knew it would make his mad. He had been drinking.
Q Did he drink very often?
A Well, yes, off and on. There was a few years where he didn't drink at a time but I knew that he had been drinking, you know, for the past year.
Q Did he drink excessively in your opinion?
A I don't know how much he drank but I knew that he drank. You could tell when he had been drinking.
Q When he was drinking did he have a vent or propensity toward violence?
A He was argumentative when he had been drinking.
Q Now, when you saw him that afternoon of the 20th he passed by the roadway there?
A Yes.
Q During the last . . . how old are you?
A I'm twenty three.

Q During the last five years has your daddy did anything at any time in your presence, conducted himself in a way at any time in your presence, or said anything in your presence or hearing that indicated to you that he had some mental disorder?

A Well, I lived with him for eighteen years I just always accepted the way he was as the way he was. Sometimes, you know, sometimes I would think that he was mean but he was usually drinking if he was mean or arguing.

Q During all of these times in all of these years did you have an opinion concerning his ability to distinguish between right and wrong?

A I've heard my mother say that he didn't know right from wrong.

Q When did you hear that?

A The last time I heard her say it was when she talked to him on the phone Labor day.

Q Labor Day. And what had he done? What did she tell you?

A She had had a conversation with him on the phone and when she finished . . . when she got off the phone with him I asked her what he had said and she first said that his mind was warped he didn't know right from wrong.

Q Well, how did he act as far as knowing right from wrong?

A Well, he did some mean things when he was drunk before but I think he knew right from wrong.

Q Well, when he got sober after doing mean things what did he . . . did he remember the mean things he had done?

A He's said that he doesn't remember when he was drunk. He always said he didn't remember.

Q Did he apologize for the things he done when he would get drunk?

A After he was sober and come back home, if he had been sent away or something, yes.

Q Would he say he was sorry?

A Yeah. He would admit that he had done them but he'd say he doesn't remember doing it and he would apologize.

Q Now what . . . do you know how often he worked, whether he worked regular or whether he was out of work a lot, or what?

A Well, he was out every now and then. I wouldn't say

he stayed out a whole lot.

Q Do you know anything about what he did, or what his duties were at the hospital in Rome?

A No, not really.

Q Now, on the night of the 20th when was the last time you saw your mother?

A Well, the sun was going down. I don't know exactly what time but the sun was going down and it wasn't long after that that it was dark.

Q Where did you see her?

A They were in the living room of the trailer.

* * * * *

CROSS EXAMINATION

BY—MR. HOLMES

* * * * *

Q After your parents separated in early September did you see your father?

A Yes.

Q How often?

A I would see him come in from work almost every day because I was off from work that week.

Q Did you have any conversations with him?

A He would stop for a few minutes when he come in from work and I might talk to him five or ten minutes.

Q Do you think that he was distressed that he was going to get a divorce?

A Yes, I think he was unhappy.

Q In the past when you and your older sister . . . you have an older sister?

A Yes sir.

Q How old is she?

A She's twenty five.

Q Is she married?

A Yes sir.

Q In the past when you and your sister married and left home what affect did that have on your father?

A Well, I know when my older sister got married he refused at first to go to the church and give her away and then the day of the wedding he changed his mind and got dressed and went, and I got married at home. I don't think that he not wanted us to get married but he was sorta disagreeable, I think, maybe.

Q Did he want to see . . . did he object to seeing his family breaking off and going in their own directions?
A He might have. I really don't know.
Q Did your father throughout your life. . .
A . . . Sir?
Q Did your father throughout your life, as you observed him, seem to you to be a different person in his actions when he was drinking than when he was not?
A Yes sir.
Q How did that manifest itself? What would he do . . . how would he act when he was drinking as opposed to when he was not drinking?
A Well, he was mean when he was drinking.
Q How did he treat you and the family when he was not drinking?
A Well, he never whipped any of us at home that I can remember. When he was drinking, it was mostly my mother that he was mad toward when he was drinking. We sorta didn't say anything when he was drinking because we knew we might make him mad.
Q When he was drinking did he have a tendancy to lose his temper?
A Yes sir.
Q Did he have that same tendancy when he was not drinking?
A He had a temper, yes sir. I never saw him beat on my mother when he wasn't drunk.
Q You're aware that your father has been committed to Milledgeville on three occasions?
A I know of two.
Q You know of two?
A Yes sir.
Q If the first one was in the '50's then you wouldn't have any memory of that?
A I don't think so.
Q When were the other times? Do you remember approximately?
A Once he was sent off in 1966 and once in 1971.
Q Do you remember how long he stayed off?
A I think it was about a month each time.
Q What time of year was it?
A It was in the summer time both times.
Q Was his drinking . . . his problems caused by his drinking worse in the summer than in the winter months?
A Yes sir.

Q What would he do in the summer that he didn't do at other times?
A Well, of course in the summer he went fishing some times and he usually drank when he went fishing and in the winter time . . . he didn't go fishing in the winter time, but it would be hot in the summer and it would just seem more reasonable to drink beer in the summer time because it's hot. Of course he drank in the winter too but he didn't usually have any bad spells in the winter that I can remember.
Q He would have his bad spells, you'd say, in the summer?
A Yes sir.
Q Are you aware that your father has got pretty serious problems with hypertension?
A I know he has high blood pressure, yes.
Q Has he had it for some time?
A Yes.
Q Do you know how long?
A I can remember his having it ever since we've moved to Collard Valley.
Q How long ago was that?
A Since 1966.
Q Do you remember that he has been in the past on constant medication?
A I knew he had medicine for it, yes.
Q Even though under medication for it has he had spells where he was unable to function, unable to go to work because of it?
A Yeah, I can remember times he's stayed out because his blood pressure was up.
Q Are you aware that your father is a diabetic?
A Yes sir.
Q Do you recall when they tried to treat him with insulin?
A Yes sir.
Q What happened?
A Well, he didn't use it for very long. I think he had a reaction from it or something and he quit taking it.
Q And he was not able to take insulin?
A No.
Q After your parents separated do you know whether or not your father wanted to reconcile with your mother?
A I know that he would have, yes. He would have.
Q Had he always done so in the past?

A Yes.
Q Do you know whether or not there was ever . . . at any time do you remember any other woman with your father except your mother?
A I've been told that there has been some but I never . . . I know there was one time once before when another man come to the house, it was while daddy was sent off, and talked to my mother about his wife having been off with my daddy years ago.
Q Each time that your father was sent off was he sent off by your mother?
A I'm not sure who all had him sent off but I know that my mother would always have to sign something to get him sent off.
Q After a period of treatment did your mother always agree for him to come back home?
A Yes, he always came back home.
Q In the period of time after their separation in September, in the week or two after the separation, do you know whether or not your parents discussed reconciling?
A I know that he called her, you know, nearly every day to ask her to come back home. She told me that he would call nearly every day.
Q Did you think your father was distressed at the possibility of losing his family, his wife and his home?
A Yes.
Q After the police arrived on the night of the 20th of September I believe you said that you saw your father out in the yard sitting in a chair?
A Yes sir.
Q What did you observe him to do?
A Well, as soon as I saw the police get out and that they were out there where he was at I went out of the house and he started walking toward . . . like he was going to walk back up the hill and I ran out to the trailer where the policemen were.
Q Did you see what your father did after that?
A Well, he walked back up to the tree where he had put the gun and then they put him in the car and they took him off.
Q Did he appear to be drunk at that time?
A I wasn't close enough to see him that well. I thought he was.
Q You thought he was?
A Yeah.

Q From past experience?
A Yes.
Q But you didn't smell any alcohol on his breath?
A I didn't get close enough to him to smell.
Q Well, what you mean is you thought he must have been?
A Yes sir.
Q Had you been up to your parents house in the week or so, or several days, before the shooting on the 20th, while they were separated?
A Yes. Me and my little sister would go up there and get some things while he was out at work.
Q Did you see whether or not . . . any evidence of your father having a big stock of beer in the refrigerator at that time?
A I can remember three beers being in the refrigerator.
Q And when was that?
A Well, each time we went up there I would check to see if there was a lot in the refrigerator and there was always three beers.
Q Do you think they were the same three beers?
A They were in the same place.
Q Would they be the same brand?
A Yes.
Q After the shooting did you have an occasion to go to the house again?
A Yes.
Q And when was that?
A It was . . . well, my little sister got some more things and she went to my aunt's house. We went up there and we started moving things out of the house when we decided that he was going to let us have it and get rid of it.
Q O.K. What did you observe in the refrigerator then?
A Three beers.
Q In the same location?
A Yes.
Q As you had seen your father in the week or two prior to September the 20th had he been drinking or was he drunk on any occasion for several days or a week before?
A I don't remember recognizing that he had been drinking. I didn't notice it.
Q You're familiar with your father's appearance when he was drinking?
A Yes.

Q You didn't observe him to have been drinking during that period of time?

A I didn't. My little sister said he was. I can't remember going up there that often. When I was working I didn't go up there that often. It was just when I had supper done and didn't have nothing to do I'd walk up the hill.

Q What was done with the house?

A My father signed it over to us and we sold it.

Q You sold it to who?

A Bill Casey.

Q What was done with the proceeds from the house?

A We split it between the four of us children?

Q What was done with the rest of the property?

A Well, we sold all of it. When we sold the house we sold all the land with it. You mean the things that were in the house?

Q The automobile and things of that nature.

A Well, my brother kept my father's car and I've got my mother's car. My brother had to pay some off on the Mercury to keep it. There was some owed on it. And we sold some of the stuff out of the house and then we put some of it in storage that we didn't want to get rid of, and I've got some of it in my own house.

Q And the money that you got from selling the house and the land and all of that was split between you children?

A Yes.

Q Is that what your father wanted you to do?

A Well, my brother had talked to him about it before I even come up here to see him and he said that he agreed to let us have it.

MR. HOLMES: That's all I have.

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TESTIMONY BY MRS. GERALDINE GODFREY

DIRECT EXAMINATION

BY—MR. PERREN

WITNESS—MRS. GERALDINE GODFREY, duly sworn.

Q State your name please?

A Geraldine Godfrey.

Q Where do you live Mrs. Godfrey?

A Route 1, Cedartown, Collard Valley Road.

Q What was your relationship to Mildred Godfrey?

A Sister.

Q How old was your sister?

A Forty six in June.

Q And what was your relationship to Mrs. Chessie Wilkerson?

A She was my mother.

Q How old was your mother?

A Seventy two in September, September the 8th.

Q How far was your home from the home of your mother?

A Oh, around the road it would probably be maybe a mile, maybe not that far. It was really just over the hill.

Q And who is your husband?

A Billy Godfrey.

Q What relationship is he to Robert Godfrey?

A Brother.

Q Mrs. Godfrey, on Labor Day, September 5th, 1977 did you have an occasion to see your sister Mildred Godfrey?

A Yes sir.

Q Where did you see her on that day?

A I went down to my mother's and she came down from her house to mother's.

Q And did you have an occasion to talk with her at that time?

A Yes. I talked to her and I took her to Charlie Hunt's to get a warrant.

Q Now, had you been, at any time that day, to the residence of your sister and Robert Godfrey?

A No sir.

Q When was the last time that you saw your sister and Robert Godfrey together?

A The day before at my home.

Q Now, on this Sunday, September the 4th, at your home what time was it they were there at your home?

A It was in the evening between seven and eight, before dark.

Q And at that time can you tell us whether or not there was any argument developed between them?

A Well, it was just a few hard words about the light bill. He wanted her to pay the light bill, which I believe was about two months, about two hundred dollars and she said she would not pay it.

Q Now, when you saw her on the 5th and carried her to see Mr. Hunt did you see any clothing of hers?
A Not that day.
Q Did you have an occasion to see some clothing of hers at some later time?
A Yes.
Q When was that?
A It was after they were killed.
Q Where did you see that clothing?
A At mother's trailer.
Q And did you obtain that clothing?
A Cathy gave them to me.
Q Cathy who?
A Venable.
Q And cince that time have those items of clothing that Cathy gave you been in your possession?
A In my closet in my bedroom.
Q How long was it after your mother and sister's death was it that this clothing was given to you by Cathy?
A It's possible that it was before they were buried but I'm not sure. It was just three or four days. Very shortly afterwards.
Q Now, did you have an occasion to observe Mildred on the 5th when you carried her to the Justice of the Peace to obtain a warrant?
A Yes sir. Her nerves were just all to pieces.
Q After that episode on the 5th day of September did you have an occasion to see Mildred again before her death?
A Yes sir.
Q When was that?
A Well, they stayed with me Labor Day night, mama, Tracey and Mildred did. They were there the next evening and I saw them two or three times later when Tracey would get off the bus at the house and they would come pick her up.
Q Now, do you know . . . where did Mildred stay after the night she and Tracey and your mother spent with you, the night of September 5th?
A They went to Preacher Pierce's in Rockmart, Jackie Newby's parents, and they stayed maybe two or three nights there, then they went and stayed a few nights with my nephew, Monty Newby, and then they came back home later.
Q Do you know how long your sister and your mother

had been back home staying at your mother's house trailer before they were killed?
A Not exactly, no sir. It may have been a week or it may not have been that much. I don't remember exactly.

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TESTIMONY OF TRACEY GODFREY

DIRECT EXAMINATION

BY—MR. PERREN

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A I'm not sure, about four or five . . . maybe . . . about three or four days.
Q Three or four days. Where was your house? Where did your mother and daddy live when they were living together?
A Up the hill from my grandmother.
Q Was it very far?
A No sir.
Q Could you see your house from your grandmother's trailer?
A Yes sir.
Q Now, when did you and your mother leave the house where your daddy lived?
A September the 5th.
Q And was that some sort of holiday?
A Labor Day.
Q Labor Day. Did you have to go to school that day?
A Yes sir.
Q And what happened Labor Day that caused your mother and you to leave?
A My father got drunk and he was threatening my mother.
Q How was he threatening your mother?
A He pulled a knife on her.
Q Did he use the knife in any way?
A He cut her clothes.
Q Where did he cut her clothes?
A I don't know. He took her in the bathroom and I didn't see him.

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TESTIMONY OF SEALS MINSHEW

DIRECT EXAMINATION

BY—MR. PERREN

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Q Now, what caused you to go to this particular place at that time?

A We was dispatched by our office by radio transmission to go to this place.

Q Now, when you arrived there who was there?

A Mr. Robert Godfrey was there.

Q Where was Mr. Godfrey when you first observed him Mr. Minshew?

A Sitting beside a big oak tree approximately fifty yards from the trailer.

Q And when you arrived there and saw him were you aware of what had happened?

A Yes sir, my partner had already left the car and went to the trailer and found two white females that had been shot?

Q Now, after you had seen this did you make any . . . did you approach Robert Godfrey?

A Yes sir, I did.

Q Or did he approach you?

A I approached Mr. Godfrey.

Q At that time did you interrogate him in any way?

A No sir, I did not.

Q When you approached him there at the scene what, if anything, did he say to you?

A Mr. Godfrey was sitting in a chair beside the three when I approached him and he called my name and said "there's no need of going to the trailer they're dead, I killed them".

Q Now, at that time did he have any weapon?

A No sir, he did not.

Q Who was your partner?

A Patrolman McLendon was with me.

Q At that time did you make any search about the premises there for any weapon?

A No sir, I did not.

Q Was any weapon produced?

A Yes sir, Mr. Godfrey showed me where the weapon was.

Q Now, did you ask him where it was?

A No sir, I did not.

Q How did he go about showing you where the weapon was?

A He told me that he'd show me where the weapon was and he did.

Q And at that time had you interrogated him at all?

A No sir, I had not.

Q Did you interrogate him at all?

A No sir, I didn't.

Q Now, where was this weapon?

A It was also approximately fifty yards from where he was sitting in an apple tree. It was in the fork of an apple tree.

Q How far was this apple tree from the trailer?

A Approximately fifty yards also. It was in a little triangle shape.

Q . . . He recognized you?

A Yes sir, he called my name.

Q Were you in uniform?

A Yes sir, I was.

Q How long have you known Robert Godfrey?

A I've been knowing Robert for a good while. I mean, we're not what you call . . . see each other very much. I just see him around that's all.

Q And during the time that you have seen him around, the length of time that you have known him, have you paid any attention to the way he acted, conducted himself?

A No sir, I haven't.

Q Was his actions at any time while you were around him ever such as to draw your attention to him?

A No sir.

Q When he was seen by you there at Mrs. Chessie Wilkerson's trailer did you notice anything about him that particularly attracted your attention by his mannerisms, his actions, his conduct, or his speech?

A No sir.

Q From observing him and being with him at that time do you have some . . . or did you arrive at some conclusion or opinion in your own mind as to whether he was sane or insane at that time?

A In my opinion he was sane.

Q And at that time did you arrive at some opinion there at the scene as to whether or not he had the mental capacity to distinguish between right and wrong?

A Yes sir.
Q What was your opinion as to whether or not he had the mental ability to distinguish between right and wrong?
A In my opinion he knowed right from wrong.
MR. PERREN: That's all the questions I have.

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TESTIMONY OF J. K. McLENDON

DIRECT EXAMINATION

BY—MR. PERREN

* * * * *

Q What time of the night was this approximately Mr. McLendon?
A Approximately eight forty five (8:45).
Q Now, at that time, after viewing the scene, did you participate with Patrolman Minshew in bringing Robert Godfrey, the defendant, back to the county police headquarters building?
A Yes sir.
Q Now, while he was there at the police headquarters building did you interrogate him or question him?
A No sir.
Q What did he do while he was there?
A He asked me for a cup of coffee and I got him a cup of coffee.
Q Where were ya'll at that time?
A We were in the back part of the kitchen.
Q And was he handcuffed?
A No sir.
Q When you got him a cup of coffee did he drink it?
A Yes sir.
Q What was the manner in which he was acting, conducting himself at that time?
A He was real calm and collected.
Q What, if anything, did he say to you there while he was drinking his coffee?
A He told me . . . he looked at me and he said "Mack, I've done a hideous crime," he says, "but I've been thinking about it for eight years". He said, "Id do it again".
MR. PERREN: I have no further questions.

CROSS EXAMINATION

BY—MR. HOLMES
WITNESS—MR. J. K. McLENDON
Q Mr. McLendon. . .
A . . . Yes sir.
Q When you got to the scene did you see the defendant then?
A No sir, not when. . .
Q . . . When was the first time you saw the defendant?
A When Officer Minshew had him in custody.
Q Where was that?
A I went to the trailer and saw what had happened inside and I turned around immediately and sealed the trailer, when I turned around I saw Officer Minshew with Mr. Godfrey back . . . they were behind the patrol car then.
Q And then did you proceed out to the patrol car?
A No sir.
Q At that time?
A No sir.

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TESTIMONY OF MRS. JEAN LEBKICHER

DIRECT EXAMINATION

BY—MR. HOLMES
WITNESS—MRS. JEAN LEBKICHER, duly sworn.
Q Would you state your name please mam?
A Jean Lebkicher (L E B K I C H E R)
Q Where do you reside Mrs. Lebkicher?
A Rome, Georgia.
Q And what do you do for a living?
A I'm director of nursing at Northwest Georgia Regional Hospital and coordinator of clinical services.
Q In that capacity have you had occasion to know the defendant Mr. Robert F. Godfrey?
A Yes sir, I've know him off and on since 1953, while he was employed at our hospital.
Q How long . . . has he been employed off and on since then?
A Almost consistently. He's had two resignations during that time, which one time he went with an insur-

ance company for a short period of time, and another time, as I remember, he went with a textile mill for a very short period of time. Each time he returned back to the hospital.

Q Have you had occasion in that period of time to be associated closely with Mr. Godfrey?

A At one time I was the operating room supervisor and he worked directly under me, as director of nursing, of course, he's always worked under me but through another supervisor.

Q Throughout that period of time what type of work did he do at the hospital?

A In the operating room, of course, he served as an assistant to the surgeon in helping to apply casts, he did work in our work room putting up packs, he was called upon to assist in the recovery room and things of this kind. In the hospital in general he's worked on several of our units in caring for patients. His last assignment was in our Infirmary Intensive Care Unit. He's always been dependable, and very kind to patients, and has rendered excellent nursing care to patients.

Q Have you through this association had occasion to form an opinion as to his character?

A I can only say what I've seen in the hospital. He's been dependable, he's been trust worthy, he's been kind, he's been compassionate toward the patients, and of course these are the things that we're looking for in the hospital. We're there for one purpose and that's patient care as, as far as his character in patient care there's never been any problem.

Q Can you tell us whether or not you would believe the defendant under oath?

A Yes. I have never found him to lie to me at any time in all the years I've known him so I would have no reason to distrust him.

MR. HOLMES: Your witness.

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TESTIMONY OF DR. JOSEPH LIANG

DIRECT EXAMINATION

BY—MR. HOLMES
WITNESS—DR. JOSEPH LIANG, duly sworn.

Q Would you state your name please sir?

A Joseph Liang (L I A N G)

Q What is your profession?

A I'm a physician.

Q Dr. Liang, where are you employed?

A By the State of Georgia, the Northwest Georgia Regional Hospital.

Q And how long have you been employed there?

A Since August, 1957.

Q And in what capacity have you served?

A I was employed as chief of surgery in the hospital.

Q You have worked in the hospital and have you had occasion to know the defendant Robert F. Godfrey?

A Mr. Godfrey, I've known him since the latter part of 1958. He worked very closely with me in the operating room for maybe ten years and later on he worked . . . I still know him, he worked in the ward and I have been in contact with him all this time, until I became sick in June 1977.

Q Doctor, what is your opinion of his work at the hospital during that time?

A I think he performed his job very well and I've always found him to be courteous and very good to the patients.

Q In this time that you have worked with Mr. Godfrey have you had occasion to form an opinion as to his reputation there where he worked in the community?

A You mean reputation in regard to his work?

Q Yes sir, and just in general.

A In general I think he has a very good reputation. He's a good worker in the hospital.

Q Would you believe the defendant, Mr. Godfrey, if he said something while under sworn oath?

A Yes.

Q Do you have any reservations at all about taking his word or relying on his word?

A I do.

Q You would?

A Right.

MR. HOLMES: You may question the witness.

CROSS EXAMINATION

BY—MR. PERREN
WITNESS—DR. JOSEPH LIANG

Q Dr. Liang, you have no knowledge whatsoever con-

cerning his general reputation within the community where he lives do you?

A No. I understand that he lived at one time in Rome for a short time but I thought he always lived in this community, not in the Rome area.

Q Now, you do not know anything about his general reputation in the community where he lives do you?

A No.

Q Your knowledge of him has been restricted to his function there in the hospital?

A That's correct.

Q Now, you have observed his functions over a period extending from 1958 . . .

A . . .'57, August '57.

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TESTIMONY OF DR. WILLIAM S. DAVIS

DIRECT EXAMINATION

BY—MR. HOLMES

WITNESS—DR. WILLIAM S. DAVIS, duly sworn.

Q Would you please sir state your name and address?

A Yes. William S. Davis, and I practice at 1970 Cliff Valley Way, Northeast in Atlanta.

Q What is your profession?

A I'm a physician specializing in psychiatry.

Q What is your educational background and training please sir?

A I graduated from medical school at Vanderbilt University School of Medicine in 1956. I interned at the University of Mississippi Medical Center in 1956 and '57, following which I did general practice in Jackson, Mississippi for four years. In 1961 I left Jackson and went to Kansas City, Missouri where I took three years of specialty training in psychiatry and upon completion of my residency, the three years of specialty training I left Kansas City and moved to Rome, Georgia where I practiced general psychiatry in the Harbin Clinic for about eight years until . . . 1964 and eight, 1972. At which time I left Rome and then went to Atlanta where I've been practicing since.

Q You're licensed to practice medicine in the State of Georgia?

A Yes sir. I'm licensed to practice medicine in the State of Georgia. I'm certified in Psychiatry by the American Board of Psychiatry and Neurology. I'm a fellow of the American Psychiatric Association. I'm a clinical assistant professor of Psychiatry at Emory University School of Medicine, past president of the Georgia Psychiatric Association.

Q Dr. Davis, in the past have you had occasion to treat the defendant Robert F. Godfrey?

A Yes sir. I had occasion to treat Mr. Godfrey when I was practicing in Rome.

Q And what was the general nature of your treatment and his problem at that time?

A Well, the problem was two fold, well maybe three fold, but the initial problem for which I saw Mr. Godfrey was alcohol abuse. He had been drinking heavily and I hospitalized him and detoxified him from alcohol and withdrew him. He had a rather hard time with the withdrawal but we got through that and after the withdrawal was completed then he was right severely depressed and I saw and treated him for his depression after he got out of the hospital, and associated with, I guess, both the alcohol and the depression was a great deal of marital disharmony he was having. It seems that his wife really objected to his drinking. She objected to his drinking any at all and made her objections known quite vocally and I suppose her feelings about it back even that far ago were that she was seriously considering leaving him even back then, you know, if something couldn't be done for his drinking.

Q Have you had occasion to see him since that time?

A Yes. I had not seen him for a number of years, since I moved from Rome, until I saw him in my office, I believe it was the 24th of last month, February.

Q That was pursuant to an order of this court?

A Yes, that was. That was on order of this court to examine him, I guess, with reference to the matter that we're talking about now.

Q What was the nature of your examination?

A I did a psychiatric evaluation, psychiatric examination, as I . . . you know, as I do on all patients that I have seen. Of course having already seen him and known him I knew, you know, a good bit about him and maybe there were some things that I didn't do, but I sat down and interviewed him, took a history, actually attempted to take a history dating back essentially from the time that I stopped seeing him in Rome until the present time. During the course of the history made observations as to his abil-

ity to think, his ability to reason, his memory, his recall, his orientation as to the time and place, of course as to whether he knew where he was and what time it was, and the day of the week it was, and whether he knew what we were talking about with regard to the charges that had been filed against him. I observed him for signs and symptoms of anxiety, also observed his expressions and facial movements as he talked, made particular notes with regard to how he was able to put a thought together, was he able to tell it in logical sequence or was his thinking scattered and disorganized, checked his ability to remember specific facts, general information, and I think some simple calculations that we had gone through. These are the sort of routine things you do in the course of an examination.

Q You're aware doctor that the defendant is charged with killing his wife and his mother-in-law on September 20th of last year?

A Yes sir, that's what he told me.

Q Now, what specifically concerning the history interview of the defendant . . . what specifics did you get into relative to the incidents alleged in the indictment?

A Well, in the course of taking the history from Mr. Godfrey we recounted . . . he recounted to me actually a continuation of the same general kind of pattern that had been established at the time I saw him in Rome, with his drinking periodically, his wife objecting to this, their arguing at times about it, her saying that she was frightened of him, and at times saying that he was violent, and then his, as he was in Rome, sort of down playing the extent to which he drank and the extent of the violence. One thing which I do recall rather outstandingly vividly in the course of seeing him while I was in Rome was that her accounts of the violent episodes were much greater than were his, as was her account of how much he was drinking. But anyway, be that as it may, he went through the history of their marraige which was essentially as it had been, the history of his work at which he was progressing reasonably well, he related to me of course that he had been ill and that while he had formerly worked at two or three jobs that because of his diabetes and high blood pressure he had been required to cut back to where he was working only at what is now the Northwest Georgia Regional Hospital, formerly it was Battey where he had worked for a number of years. He, you know, gave a medical history of

having some problems with his blood pressure, he had had trouble controlling the blood pressure, it had been 200 . . . 180 to 200, the upper level of blood pressure, the systolic blood pressure, and had ranged from . . . oh, 100 to 135, as I recall, at the lower level or diastolic blood pressure. He could sometimes get it down and maintain it around 140 to 150 for brief periods of time but then it would go back up to somewhere in the neighborhood of 200 again. Then he had also had a similar problem with his diabetes and I suppose that the two were connected in that the diabetes certainly does cause hardening of the arteries but he had been tried on Insulin and had an allergic reaction to the Insulin and broke out all over and was unable to take the Insulin and had been trying to control the diabetes with diet alone and had had some problems with that, and had had some . . . enough difficulty that he had been advised to cut back on his work and so he had just been working the one job. Finally the relationship between the two of them, to bring it on down to more current times, had become so strained and she had begun to, I guess, feel hopeless about his changing and had left. He had always in the past been able to persuade her to come back and be reconciled and they had either, I guess, separated or semi-separated any number of times. She had actually left or threated to leave, and maybe had left a little bit any number of times but he had always persuaded her to come back, and he said to me that when she left this time he thought at first that it would be more or less like it had been before and that he would eventually, once she got settled down, be able to persuade her to come back and so he wasn't too concerned about it initially but as time went on she continued with her determination this time to leave and he became more and more concerned that she really was going to leave and was going to divorce him. And he recounted to me that as he began to believe that she intended to go through with the divorce that he really became quite depressed. It was as if his whole world was falling apart, like nothing meant anything other than, you know, than his marriage, if he couldn't have his marriage, if he couldn't have his wife then he really didn't care. He was able to recount a rather . . . well, a violent quarrel that they had had a week or two prior to September 20th in which she had filed, he said, charges of assault against him and following that quarrel said that he never saw her to talk to her again, that he tried on a number of occasions

to get to meet with her face to face but she would not, even so he still harbored the hope, maybe even the belief, that she would ultimately come back and that he would be able to reconcile with her. He carried this on up to the day on which the shooting occurred, and while at work that day he related that his mother-in-law had in fact called him and told him that his wife wanted to see him and he was very hopeful then. Within his own mind he had convinced himself that finally she was coming around and that she wanted to see him to tell him that there was some chance that they could get back together, and he worked the rest of the day, I don't remember how long that was, I can't recall when he said she called, but he worked the rest of that day convinced that when he got home that night and finally could talk with her that they were going to get their problems all resolved. He got home and . . . well, to make a long story short, a telephone call came from his wife, he answered the phone and she did not want to be reconciled but wanted to discuss the terms of the settlement which really upset and disappointed him, they couldn't agree, he said, he hung up the phone, or she hung up the phone and he did too, but she had told him before she hung up that she would call back later in the evening. He ate his supper, after they stopped the conversation, and was really feeling down but had hoped maybe that they could talk the second time. He ate and sat down to read and the phone call came again and it was again from her, the conversation went pretty much as it had been before, she did not want to reconcile, she wanted a settlement to which he would not agree and told her so. Finally he asked her one more time if they could not meet face to face to talk about it and she told him no she wouldn't meet with him face to face. The argument then, I guess, became, he said, more heated. Finally she just hung up the phone and at that point the realization that she meant business came through to him, and as he said he has never felt so hurt, so down, so low, so blue as he was the moment she hung up the phone and the realization hit him that she was, you know, dead serious about going through with the divorce and there was no chance for reconciliation at all. At that point he says he remembers hanging up the phone and doesn't remember anything else until the next day, the next morning, in jail.

Q Doctor, based on his relation of this history to you and your previous knowledge of him were you able upon your examination to form any kind of opinion as to what the state of his mind was at that time or whether or not he was . . . what sort of state his mind may have been in at that time?

A At which time are your referring to now?

Q I'm speaking of on the 20th after the last telephone call.

A Yes. I decided that on the 20th after the phone call that he had a . . . what is known as a dissociate state, a dissociate attack, and that this attack lasted from the time that he first finally realized that she was not coming back home until he woke up the next day in jail and came back to his senses at that point in time. Looking back on it it seemed to me likely, what I had thought of, as being, you know, a person's attempt to deny . . . some of his drinking might very well have been also associated with some states of dissociation on down through the years culminating in this one final attack.

Q Did his history reveal to you any previous episodes that may suggest a blackout or an amnesia to any extent?

A Well, as I indicated he tried to make . . . always treid to make light of how much he drank. I wish maybe that I had been a little more critical in my thinking about it at the time that I was seeing him then, considering the circumstances now, and what I thought, or what I attributed to just the alcoholics tendancy to deny his drinking which alcoholics are notorious for doing, probably were representative of states of dissociation while he was intoxicated and in an argument with his wife even back then, and that this one, though it was not under the influence of any alcohol was under the influence of the strongest most powerful emotion that he had ever felt and that was enough to trigger it at this time.

Q Doctor, if you would, for our benefit, speak more or less theoretically and if you could explain what a dissociate state is and whether or not that is a type . . . a psychiatric term that is well accepted in your specialty?

A All right. Yes sir, a dissociate state, I guess a dissociate state is the most common psychiatric condition which is known to be one of the most common non psychotic psychiatric conditions which is responsible for some alteration in consciousness. In a dissociative state a person can just actually cut off from his mind oh, stimuli such as say bodily sensations may not come through to awareness. He may cut off from his mind awareness of what's going on

around him, he may cut off from his mind memory, all of these things can be cut off from mind when in a state of dissociation. And in such a state a person may be able to carry out thoughts, feelings, impulses, which he could not release were he in his normal state of conscious awareness. I guess that you might say in that condition a person might acting sort of automatically, that his will, if you will, his will was absent or greatly reduced may be an example. A couple of examples would help to understand exactly what I'm talking about, something that maybe most everybody has experienced, a mild state of dissociation happens to most all of us at times, occurs frequently when we're driving down an Interstate and we wake up seventy five miles down the road and the last thing we remember was an hour ago. The boredom of the road causes our conscious mind to go away and it splits off and we go down to road acting . . . driving O.K. but driving more or less automatically, not consciously aware of what's going on. Another example occurs maybe, it's happened to me and I'm sure to many other people too, where after, you know, getting up, leaving home and going to and from work over the same route for a number of years on a given weekend, or sometime when you're not going to work, you get up and leave the house, have no intention of going to work, get in your car and drive off and the next thing you know you're pulling up in front of the hospital, or you're pulling up in front of the job, or you're on a street headed to the job, you had no intention of going there, you were going actually maybe in the same general direction but some place else and not there. So again the state of dissociation occurs and your will, I guess, is impaired to the extent that you didn't will to go where you wound up. Well, those are minor examples of what dissociation actually is. Certain people then, when they are in a state of dissociation, under certain conditions do tend to become violent and this is very well known, very well recognized, and it's been written about by . . gosh, hundred of authors. Certain people when they are provoked by strong emotions often times under the influences of an intoxicant will go into a dissociatiable state and tend to become violent. This hardly ever happens. I guess nothing is never in medicine but it very rarely happens spontaneously. That is, you know, a person just doesn't walk down the street and without anything happening suddenly go into a dissociative state. Usually there has to be the strong emotional

provoking factor to occur. Frequently there is the presence of the intoxicant but not necessarily so. And then under the influence of those two things, those conditions, a person can go into a state of dissociation, can become violent, and then after the episode is over . . . well, certain people have no recall but the absence of recall is not always complete, some people can remember parts of it, some more than others, but a number of people in such a state have no recall whatsoever of what happened or what transpired during the time that they were in the state. That's what I think happened to Mr. Godfrey.

Q Now, if you would, in addition to what Mr. Godfrey was able to tell you, if you would, assume the facts that I will relate to you which have been related in evidence by the police officers who arrived at the scene there, that Mr. Godfrey was found within minutes after the shooting sitting out under a tree in his front yard and when the police officers got there he recognized one of them and showed them where the gun was which was over in another part of the yard up in an apple tree and that thereafter he made some statement to the police officers relative to his committing the crime, that he did kill . . . that a couple of the officers made statements to the effect that . . . one of them said that he related to them that he had been planning it or thinking about it, to another one he said "well, it's all over now, it's just over with", all of them described him as being in a very normal and calm state, he appeared rational to them, that he was not intoxicated, there was no odor of intoxicants on his breath, and I think I've related these facts to you previously. The question is, assuming those facts are true, is that consistent with the type mental state that you have described to us, or unusual?

A Yes, it is. A person in a state of dissociation can carry on a conversation and unless someone is familiar with dissociative states and happens to think about it they could appear to be, you know, reasonably normal or almost completely normal. One thing about that whole scene that really struck me as further, at least in my mind, evidence that he was in a dissociate state was his very mornalcy, if you will. The fact that he showed no emotional upset, that he was not torn up after having done such a thing as he did, the fact that he was very calm, very quiet about the whole thing, that in and of itself to me is abnormal. The fact that he appeared so normal in such conditions to me is abnormal and says to me that there was something, you

know, going on haywire inside his head. Whereas the feeling was split off from the action that he had actually done, it had been dissociated.

Q Now, your diagnosis in this case and the psychiatric foundation for such a state is based on the idea, I suppose, that there are states of consciousness and states of alternate consciousness, and states of sub consciousness.

A That's right. That's generall . . . well, that's not just generally accepted I think it's almost universally accepted in psychiatry to be true, and again I think every one has experienced the effect of strong emotion on consciousness. Anybody that's ever gotten really mad is certainly aware that in that state his conscious awareness is really pretty much limited because the emotion limits his ability to be aware of a lot of things that are going on around him.

Q Well, is a conscious state as opposed to being, so to speak, ruled by the subconscious, is a conscious state necessary to the performance of functions involving reason and intellect?

A Uh. Well, not necessarily so. I think when the conscious mind goes away, when the conscious of the mind, what we would call ego, are impaired when that portion of the personality which normally experiences checks and balances on behaviour is impaired, that portion of the personality which is influenced, for example, by conscious is impaired so that in that kind of condition a person would not have the same degree of control over his behaviour that he would if he were otherwise normally conscious and aware.

Q Now what, if any, bearing do you think the defendant's hypertension and diabetic condition, what relation do you think it would have to the past history that he has related to you of having blackouts or blacking out?

MR. PERREN: Your Honor, I object to that. There isn't any evidence thus far as to any past history of such things existing, and I object to it on the grounds further that it is leading.

THE COURT: Rephrase your question Mr. Holmes.

Q Doctor, have you . . . would you tell us whether or not from your treatment of the defendant, from your taking of his history, whether there's been any relation to you or any knowledge on your part of previous episodes of what I'd generally call a blackout, a blackout type of state?

A I asked him about this in the course of the examination and he related to me that he had had one or two occa-

sions at work where he had . . . I believe he said nearly blacked out. I don't believe he said he completely blacked out. I believe he told me that he nearly blacked out. In answer to that question he went on further to say that there had been several occasions when he had left work and had driven home and didn't remember anything that had happened from the time that he left work until he was driving up in his front yard.

Q Well, how does the disease of diabetes have any effect or any relation on that type of thing, do you know?

A Well, you know, people with diabetes can black out either one of two ways, I guess. They can either have their blood sugar incompletely controlled so that they were running high blood sugar and get into what would be known medically as diabetic acidosis and over a period of time actually go into a coma and pass out. That's not a sudden kind of thing and it wouldn't necessarily be something that would happen in a way like this. It wouldn't happen like that. It would come over a period of time with his diabetes out of control. The other thing that could happen as far as blackouts as related to diabetes is concerned, I suppose, is an insulin reaction, or not only insulin, it could be a reaction to some kind of synthetic insulin like drugs that people take to control their diabetes. Occasionally when a person takes those their blood sugar drops so low that they will black out completely. I don't think either one of those is particularly pertinent myself to this situation. The diabetes over a period of time does contribute to the production of arteriosclerosis, hardening of the arteries, which is associated almost always with high blood pressure and high blood pressure when it gets out of control can contribute to sudden blackouts, and perhaps some of the episodes that he was relating to me at work that had occurred over a period of the past two or three years had been the result of his relatively uncontrolled high blood pressure. I think that that certainly is a possibility. To look at that whole situation and tie it back in to the emotional factors I think that . . . Mr. Godfrey had always been a hard worker, he had never really been satisfied to work one job he had worked for many years at Battey State and then he'd coach wrestling and had wrestled himself, and had done other things so that he really was very busy and had always worked and prided himself in his ability to work and in doing a good job, and I think that it came as a real blow to him, a blow to his ego, if you will,

when he got sick and wasn't able to do that any more. And I think that this was a real emotionally upsetting factor to him when he got the diabetes and the high blood pressure and had to quit doing extra jobs, things that he really enjoyed, particularly the wrestling and coaching, this was something that was a real joy to him, that he really got a lot out of and it hurt him a lot not to be able to do that. I think that contributed to some of the stress that he was under during the past couple of years and might very well have by producing an increased level of stress contributed to the liklihood that he would have a "dissociative blackout".

Q Is absence of memory general indication of this type reaction in a dissociate state?

A Do you mean is it generally associated with it?

Q Yes sir.

A Oh yes, in almost every instance of a dissociative state there is some impairment of memory. It's not always complete but I would estimate that maybe probably a third, in round numbers, a third of the people that have dissociate states do have a complete absence of memory. Two thirds have some impairment and it may be from . . . well, you know, varying degress but not complete.

Q Could you tell us please, in your opinion, after this emotional crisis you described, this provocation relative to the finality of the phone call with his wife, could you tell us what, in your opinion, what if any incapacity of his power to reason and control his actions, what, if any, impairment existed thereafter?

A Excuse me. I think you're asking me a question that I didn't think you were going to ask me so ask me again if you wouldn't mind.

Q I'm speaking of after the phone call with his wife. In your opinion was the defendant's mind or reasoning power to any extent impaired thereafter?

A After the phone call?

Q Yes sir.

A After the second phone call on the 20th you're referring to now?

Q Yes sir.

A O.K. Yes, I think that it was and it must have been because at that point in time he was . . . he remembers being . . . he remembers being overwhelmed with a feeling of despair. He remembers . . . well, he said it was like being kicked in the stomach, he said that he never . . .

he'd wrestled and he'd fought but he'd never been hurt physically anything like as badly as he was hurt when he finally realized that it was over. There was no chance for a reconciliation, and then he says to me that everything just sort of faded away, went black, and I think at that point his conscious . . . the over . . . the emotion, I started to say overwhelming emotion, and I think it was an overwhelming emotion, I think the emotion of the final finality of her rejection really did overwhelm him and he went into this state of dissociation.

Q Do you have an opinion as to whether or not his acts immediately thereafter that evening would be the product of his will?

A I think that these are acts that he could not have done had he been at himself consciously. I think had he been in his usual state of conscious awareness this act was at the time so abhorant to him that he could not have done it.

Q While someone is in this dissociative state can they exercise control over their . . . does their will, conscious will, have the ability to exercise control over their automatic actions?

A Not the same . . . No. Not to the same degree. Not to anything like the same degree as would occur when he was normally aware and alert.

Q When a person is in this type state do you have an opinion whether or not they are able to distinguish between right and wrong and to be able to consciously control their actions relative to that?

A I think they might know the difference between right and wrong but their ability to control powerful emotional forces acting on them is markedly reduced and I think in such a state a person might very well not be able to exercise control to such a degree that he could prevent himself from doing something which he knew was wrong.

Q After you had had the interview, I believe, on the 24th with the defendant did you see him on a second occasion?

A Yes, I did. I saw him again on the first of March.

Q Now, what was the purpose of the second visit?

A Well, as I was examining him the first time and had gone over and over and around and around and approached it from every possible way that I could to see that if there were not some avenue, I guess that's a good way to say it, some avenue that I could use to help prod his memory and

was not successful in doing so I got the idea that it might be helpful, so far as his memory of the situation is concerned if we could do an Amytal interview. Frequently people who are under the influence of barbiturates, Penothal or Amytal, will be able to recall things which they have repressed from their memory. He recounted, you know, lots of times that he had spent thinking over and over about what had happened and could not come up with any answers to it, he was obviously very pained because of what he had done, he felt a great deal of remorse about it but couldn't understand himself why he had done it and I guess for two reasons, one to see if he could recall the events that had transpired, and second to see if perhaps by understanding and recalling these to his conscious mind if it might not be able to help him to relieve some of the feelings of guilt and pain that he had. I suggested to him that maybe we could do an Amytal interview. I didn't. . .

Q . . .Doctor, if I could interject, when you suggested the interview to him. . .

A . . .Well, all I did was ask him if he'd do it.

Q And when you asked him that did you explain to him what the tests may. . .

A . . .Yeah, I told him. I told him at that time that the reason that I would do it would be to hopefully . . . that he might be able to recall under the influence of Amytal what he couldn't recall normally while he was awake, that I didn't know what he would recall and I didn't know what he'd say, that I certainly didn't know whether it would be something that would be helpful or beneficial to him considering his legal position at that time but that I could do it if he wanted to and he was very eager and very anxious to go ahead with it, even after I . . . you know, we had talked about it.

Q If under this type of sedation he had been able to recall the events what effect would that have had, in your opinion, on your diagnosis of his state?

A Well, I think that a couple of things. . .

MR PERREN: . . . Your Honor, I object to this based on a premise . . . it being based upon a premise which is not in evidence as to . . . it would call for actually an answer based on a hypothesis that is not present.

THE COURT: It did not occur?

MR. PERREN: Not according to testimony.

THE COURT: I sustain your objection.

MR. HOLMES: Your Honor, I think it's a proper question because it's a question, not placing it in hypothetical as to whether or not anything is in evidence but simply trying to get a response as to what the effect of the test would have on the doctor's diagnosis if there was any ability to remember under the Sodium Amytal as opposed to the ability to remember while he's in a conscious state. I think it's strictly a medical question and a psychiatrist's question rather than a question of evidence.

THE COURT: You're asking him to compare what he would have determined by a positive response as compared to a negative response on this test?

MR. HOLMES: What that would have indicated to him medically.

THE COURT: I'll allow him to go into that.

A Well, at that point I was trying to determine, I guess, three things. Number one, whether or not he was telling me the truth. Number two, whether or not he had in fact had some kind of physical insult to his brain, maybe as a result of his hypertension, a small stroke, or I don't know what, but some kind of physical something that would have come about from the hypertension and/or the diabetes that might have produced blackouts conceivably when he was told . . . when he learned that, you know, he was not going to be able to reconcile with his wife, that must have undoubtedly done something to his blood pressure, it would most people's, I guess, in the fact of such strong emotion.

MR. PERREN: I'm going to object to that statement by the doctor as to whether it undoubtedly did.

WITNESS: O.K.

MR. PERREN: It's possible that it did not and I object to it.

A Well, anyway. . .

THE COURT: . . . Well, I'll allow the answer. I think it's maybe subject to cross examination.

A But in any event what I was trying to determine was whether or not possibly he had some organic injury to his brain that perhaps produced the blackout. And the third thing was to see if he could recall, which if he had would have been some . . . possibly have been substantiating evidence to the fact that he did have a dissociated state. We went though with this interview and it really was not a totally satisfactory interview as a matter of fact.

Q What is the procedure in this type examination?

A Well, the procedure is to, you know, of course have

someone to lie down and then you inject the barbiturate intervenously into the vein in the arm and do it slowly and as you inject it ask the person to count or talk, or do something so that you can begin to determine when the drug is affecting them, when they are beginning to be influenced by it, and at that point when they cannot repeat numbers serially or when they can't go on totally logically with answers and begin to sort of wander off you know that you have reached the proper level of sedation and you are then ready to proceed with the interview itself. I gave Mr. Godfrey all of the Amytal, I gave him four grains of Amytal which under the circumstances I felt was all that was safe from a medical point of view and though he was influenced some by the drug and did skip a few numbers he counted and his speech was slurred, and he obviously was affected by it. He was not as much affected by it as I would have thought . . . or as I would have liked for him to have been to consider the interview to be, you know, more reliable.

Q Did you nevertheless proceed with some interview?

A Yes. I was there and he was under the influence of some of it and so while it wasn't as good as I thought it should be I thought we'd go ahead with it and I did proceed, and I questioned him for approximately an hour. Well, of course, as the hour progressed along he was coming out from under the influence of the drug but initially he was influenced by it to a considerable degree and was some still when it was over, but I questioned him for an hour and he still could not remember anything.

Q To the extent that the procedure is valid what did that indicate to you as a medical psychiatrist?

A Well, the basis for the Amytal interview, or the idea behind it is, that a person under the influence of Amytal will tell what he knows and can recount things, or recall things, that he can't remember, and I guess to the extent that a person tends to relate things that he consciously would not. You would consider the interview positive and corroborating the fact, you know, that he didn't remember it. He really did not remember it.

Q Was he able to answer questions while he was under the influence. . .

A . . .Yes. Oh, yes.

Q In your opinion, to the extent this test was useful, do you have an opinion as to whether or not it substantiates his conscious answers to your questions?

A It was certainly consistent with the conscious answers to the questions. He answered . . . he gave the same answers under the influence of the drug that he had given when he hadn't had no drugs at all.

Q Now, this type procedure is it a normal or usual or unusual type supplementary procedure for psychiatric assessment?

A Well, it's unusual in the sense that most people don't have it. It is not unusual in the sense that whenever you're in a difficult situation and you need to try to get someone to recall some information that it's used very often. But you, you know, most psychiatrists are not in this kind of situation with most patients and so in that sense it becomes somewhat unusual but it's not uncommonly used in this type circumstance.

Q What is . . . if you could just briefly relate to us the history of this type sodium . . . Sodium. . .

A . . .Penothal or Amytal.

Q Has it been so used in the past?

A Well, it was started back in World War II when soldiers who were in combat had suffered. . .

MR. PERREN: . . . Your Honor, I object to this line of testimony on the grounds that it would necessarily be based on hearsay. I have no objection to the doctor testifying about his experience in the use of Sodium Penothal but Hitler and all those folks I object to.

A This is a. . .

MR. HOLMES: . . . Your Honor, I. . .

THE COURT: . . . Just a minute.

MR. HOLMES: I don't think this. . .

THE COURT: . . . If you'll let me Mr. Holmes I'll try to rule with you. I'll allow the doctor not only to testify concerning his experience but reliable literature or research concerning the drug, but he would need to testify wherein he received that knowledge before he does relate that to the jury.

Q In your training in psychiatry all these years doctor have you had occasion to study, read about, and personally experience this type procedure with Penththal and Amytal?

A Yes.

Q Are you aware from your reading and training of somewhat of the history of its use?

A Yes.

Q What could you relate to us concerning that history?

A Well, in the course of training with relation to the treatment of certain conditions . . . well, dissociated states, I learned that back during World War II Dr. Carl Minniger and some others got the idea that if a person could be influenced to recall the traumatic instance that caused them to lose their memory, the thing that had happened to them on the battle field, that they might relive the experience and through reliving it be able to, you know, be well and be better. So they got the idea of inducing a sort of hypnotic state, a state similar to hypnosis, which is another state people can often times remember things that they can't consciously, but they got the idea of trying to use Pentothal, they had used at that time, so they came up with the original Pentothal interview in which people, these veterans or soldiers, would be given the Amytal or Pentothal and then would be led through the war time experience that they had had in an effort to help them relive it and re-experience it with the hope and with the idea of by reliving the experience, getting rid of all the emotion that was pent up inside that caused them to be sick. That was the original idea that this became to be known as sort of a truth serum where these people would tell things that they could not or would not tell when they were normal and conscious.

Q Now, to the extent that the defendant was under the influence do you have an opinion as to whether or not what he related to you while under this drug is to be given, in your opinion, any degree of reliability?

A Well, I think that I feel that he did tell me the truth. I don't feel that just simply because of the interview. The interview tended to corroborate everything that he had told me previously in, you know, reliving the experience that I had had with him down through the years. He has been consistently pretty open and pretty truthful, has, you know, been pretty much up front with what's happened and how it's happened with the exception of the differences in the accounts of how much he drank and the extent to which he was violent, though he would often times, you know, he would say quite readily that he was violent and that any was too much but there was often times some discrepancy with regard to how much of it there was. Never a discrepancy as to the fact but just to the degree with which it had occurred. So knowing that he had been consistent and truthful down through the years I'm sure had an influence in my thinking with regard to

the truthfulness of his answers to me at this time.

Q Now, while a person is what you've described as a dissociate state that this . . . in your opinion that this defendant was in on the night of September 20th, was he able after entering upon this state to exercise conscious control over his actions?

A No. No, he was not.

Q Is that a classic characteristic of this type state in its severe form?

A Yes. And I would say that the events he described to me and that you have described to me are really classical sorts of events and you could go to any number of textbooks and pick it up and read about a dissociative state and in many instances read almost word for word what he's talking about, what's happening.

* * * * *

TESTIMONY OF ROBERT F. GODFREY

DIRECT EXAMINATION

BY—MR. HOLMES

WITNESS—MR. ROBERT F. GODFREY, duly sworn.

Q State your name please.

A Robert Franklin Godfrey.

Q Mr. Godfrey, are you a resident of Polk County?

A Route 1, Cedartown, Polk County.

Q Do you presently reside in the Polk County jail?

A Yes sir, for the last five and a half months.

Q Mr. Godfrey, how long were you married?

A Almost twenty eight years.

Q When did you get married?

A The 14th of January 1950.

Q Where have you been employed since that time?

A With the State Health Department, used to be Battey State Hospital, now Northwest Georgia Regional Hospital, Department of Human Resources, for a little over twenty five years, broken service.

Q Have you been employed or held other jobs?

A Yes, I have. I took a position with an insurance company at one time back in the '50's, and I worked with a chemical company in the lab back in 1970 for a short period of time.

Q Have you been at any time confined the the mental hospital in Milledgeville?

A Yes, I have. Once in 1950 and again in '66 and I was transferred from Milledgeville to Murfreesboro VA Hospital in Murfreesboro, Tennessee. I was in Milledgeville in 1971, I believe it was.

Q What caused you to be committed to these institutions?

A Well, it was my drinking. My wife had me committed. Took a warrant for me and had me put in jail for my drinking. She didn't like what drinking I did so she put me in jail and the only alternative I had was to go to Milledgeville, or thereabout. I was committed.

Q How long did you stay down there?

A Well, the first time I stayed approximately four weeks, I would say. I can't remember exactly the amount of time, and they discharged me. And the second time when I went back I stayed there approximately four or five weeks and then I was transferred to Murfreesboro Hospital in Tennessee, Federal VA Hospital, and I stayed there a month and a half or two months, something like that. I'm not sure of the amount of time specifically.

Q Each time that you were released did you go back home?

A Yes sir.

Q Did you go back with your wife?

A Yes sir.

Q Did you ever, because of these commitments, want to separate or divorce your wife?

A No sir, not on my behalf.

Q What type of work did you do at the hospital?

A I'm a surgical technician, or classified as a male nurse. I've worked in the operating room, intensive care units, A.C.U. units, CCC units, in the emergency medical treatment and the traumatic medical at Floyd Hospital emergency room. I have worked there over a period of years, two jobs.

Q Now, in previous testimony there's been mention of an argument with your wife on or about September the 5th. Would you tell us about that?

A Yeah. I'll tell you what I can remember of it. We did have an argument on the 5th of September, Labor Day, I was at home and I was drinking some and we got into an argument . . . not into an argument. We were talking about . . . discussing selling the place to my nephew, and

this and that, and we got into a rather, I guess you'd say a heated argument about the situation, it went on to the point that she got up and left later, or we went into the bedroom and I talked to her a while and I was out and then she left after this. This is when she left.

Q Did you make any threats, or do you recall making any threats?

A I do not recall making no threats. I did tell her what I would do, we'd sell the place and divide the property but I would not give it all to her, not money wise. I told her she could have the home if she wanted to live there and I'd just leave and give her everything, something like that.

Q When was this now?

A On the 5th of September.

Q You don't remember threatening her with a knife?

A No sir.

Q How much had you had to drink?

A I won't be specific but I'd say four or five maybe, Country Club, cans of beer, king size.

Q After that did your wife leave you?

A She left and I did not . . . not to come back home any more. Not to my knowing. She did go in the house while I was gone I understand, because she had a key to go in anytime she wanted to, but now the door was unlocked for that matter.

Q Well, was anyone encouraging her to leave?

A Well, her mother, yes. I won't say encouraging her but she made remarks to the effect that she should, or that if it was her she would.

Q Had she ever, to your knowledge, become involved in yours and your wife's marriage?

A Yes sir.

Q In what respect?

A Well, she . . . I guess I should say in an argumentative way, more or less telling my wife what she should do or shouldn't do, and I think my wife did adhere to some of these things at times too. I'm quite sure she did.

Q After the 5th of September did you see your wife for any length of time?

A I saw her two different periods of time to talk personally with her. She was sitting in her car both times. She come up in her car, not to the house, but it happened to be at the mail box. Then one day she turned off of the main road by Mr. Benefield's home and I talked to her for a few minutes. Two different times personally. No, I'll say

three times because I had her car repaired and I brought her car to her. I had a water pump put on it and carried it to her.

Q Did you make an attempt to reconcile with your wife?

A Not at those particular times I did not. I asked . . . well, I did. I asked her the question if, in the words, "are you ready to come back home", or something, and she said "no" so I didn't go any further into it.

Q Did you have any conversation with her later other than over the telephone?

A Nothing except the one on the telephone.

Q On the 20th day of September what did you do, starting in the morning of that day?

A I got up at the usual time about five or five fifteen, shaved, brushed my teeth, and went to work. I fixed some breakfast for myself. I ate a light breakfast and I went to work at about six fifteen. It was about six fifteen when I left home. I started in to duty about a quarter till seven. We had to sign in and sign out. And I Worked the whole day on the 19th and the 20th.

Q And how long were you there on duty?

A Eight hours.

Q When you left the hospital what did you do?

A I left at approximately three thirty and getting through traffic in Rome I was about . . . I didn't pinpoint the time, I'd say four or four fifteen or thereabouts when I got home.

Q Have you had any trouble in the past with your physical health?

A Well, I have hypertension and diabetes. I've had hypertension for eight or nine years and diabetes for about four. I've known of it for about four years.

Q What range is your blood pressure in when it's unregulated?

A Well, it goes very high. It's nothing for it to be 200/120 to 140. If I can keep mine at 150/100 I'm real fortunate, but this is hard to do for me in my case. I'm under medication.

Q Have you had occasions in the past where you were unable to go to work because of this?

A Yes sir.

Q Can you tell us with what frequency?

A Well, I have got up some mornings, get up as usual . . . try to get up . . . would get up and I would be . . . my

equilibrium would be so shot that I had no balance, I couldn't focus . . . well, I just couldn't focus on anything as far as eyesight wise, and I would call the hospital and not report in. This has been sometime the medications too along with numbness, I guess.

Q What about the diabetes? What kind of treatment has been attempted for that?

A Well, Dr. Smith, at first he said "well, you're borderline", but then again some short time later he did a fasting blood sugar, which is a procedure to check for diabetes or anything else, and then he put me on insulin, 20 units to begin with and then he raised it to 30 units, and I had been taking it for a few weeks and I had a severe reaction from it and I stayed off of it for about three days and I started again and I had a severe reaction a second time. So he told me to stay off of it, to leave it alone, and then he put me on a diet, which I was really already on my own self, but he put me on a 2500 calorie diet that has since been followed.

Q When were these attemps to use insulin?

A Back in the spring of last year, spring or early summer, I'm not specific.

Q Have you had any problems that you're aware of with blackout spells?

A I have, yes sir.

Q Would you describe them for us?

A Well, at times when I . . . I'll not completely pass out but I've had the point to where I have had to sit down and things just black out to me as far as having knowledge or anything. I don't mean unconscious completely but just having knowledge of what was going on around me.

Q How . . . with what kind of frequency have you experienced this?

A Well, I've had no particular sequence it followed. I have been at work, I have been at home, I've been outside working in the hot sun or something like this, and days I have been just sitting in the house doing nothing but maybe reading or something like this for a few times. It don't happen real often. It's something that's started in the last two or three years to the point that I really became concerned and was noticing it, but I still think maybe it was the medication or hypertension is what sometimes does it. I don't know. I assume that's what it is.

Q While you were at work did you get a message of any phone call? I'm speaking of on the 20th of September?

A Yes sir, I did.
Q What was that?
A My mother-in-law called me. She asked me was I going to be home that afternoon and I said "yeah, I'll be at home the usual time", approximately the usual time. She said my wife wanted to talk to me, phone wise not personal wise. I told her yes I'd be at home.
Q After you left the hospital what did you do?
A When I left the hospital?
Q Yes sir.
A I then came through the city of Rome and came on home. I got home about . . . between . . .it was four or four fifteen, somewhere around there. I didn't pinpoint the time because I didn't pay any particular attention to it.
Q What did you do after that?
A My father was there, he came up in the yard . . . I was still in uniform and he came up in the yard for the purpose . . . we had planned to go dove hunting, or was going . . . we had planned to go dove hunting that week sometime and he happened to come by out there that afternoon and we were talking and I asked him to go in the house and he said no, he wouldn't, he says, "do you still want to go dove hunting" and I said "no, I don't think so today, I'm tired, let's wait until Saturday, we'll go Saturday", the following Saturday, and he says "O.K." We must have talked, I guess . . . I really . . . I don't know about the time, twenty, thirty, forty five minutes or maybe more or maybe less, then he left and I assume that he went back home or over to Bill's, he usually stopped at my brother's house over on Collard Valley Road there, about a mile from my house. Then I went on in the house. I asked him again before he left though to come on in the house I was going to fix me something to eat, a lunch, he said no he'd go on, so then I went in the house and changed clothes. I fixed me some lunch and then I noticed . . . I fixed my own lunch a lot of times and carried it with me and I noticed I needed some odds and ends of meat and milk and bread so I . . . I don't know, it must have been about five, I guess, again I didn't pinpoint the time, looking at it, I went back to town. I came out of Collard Valley Road and went out by the State Trooper barracks to the fruit market down here and picked up a loaf of bread, a half gallon of milk, and some packages of meat, lunch meat, and I returned back home. I must have been over there fifteen or twenty minutes. I got back to . . . right in front of my daughter's

house and my son-in-law flagged me down, stopped me, he said I want to show you a snake I killed, so I looked down in the ditch . . . he killed it in the house, it was a king snake or chicken snake, harmless. So then I went on up to the house. I think I spoke to my grandson and my daughter, then I went on up to the house and went back in the house, I don't remember how long I had been there and my wife called the first time and we talked a while on the phone.
Q What was the nature of that conversation?
A Well, my purpose was for reconciliation, going back together, because I did not want to break up our marriage, you know, from my standpoint. And the property, we mentioned the property settlement. And I went over that again with her, I told her . . . I said, you're asking for a hundred percent or all of it and I said I don't think that's fair. I said I think part of it is yours as much as mine but not all of it. I said I'm willing to sell the place and give you half the proceeds after our debts are paid off, or give you the home and everything that's in it and I'll just take my car and myself and I'll go and not contest it if that's the way you've got to have it, but I said I don't want it but I said I will not give you all the money that comes out of it if we sell it. She says, well, I don't want the home it's too big to look after, too much lawn and too much . . . I don't know, two or three different things she said, but she just didn't want it. She didn't want to spend that much time with it because it was a big home, a big problem to keep up. And so she said well . . . I said, well I still am not so concerned with the finance part of it I'd give all of that away before I'd really let our marriage be broke up if that will take it, she says no, it won't. I don't think there's no need talking further on that so we didn't talk no more. She said, "I'll call you back later", and so she did.
Q O.K. How did you feel about the prospect of your marriage being ended?
A Well, I felt about as low as anyone can feel I guess, about as low as I ever felt in my life about anything. I felt a loss . . . a complete loss as far as my own personal self was concerned.
Q Then did you speak with her on the telephone the second time?
A Yes, I did. In between that I was in the home. I think I went outside once or twice, out in the sunshine, and then I went back in the house and got a book to read

because I . . .I couldn't get in the book . . . couldn't get the interest in the book because of problems I had, so the phone rang later on . . . this must have been . . . I don't know, seven, seven fifteen or seven thirty. I wouldn't try to pinpoint the time because as I said I did not look at the time. I wasn't thinking about time periods. She called again and we talked quite a while approximately about the same thing, and it got . . . I guess you could say it kinda got heated at a certain point. I'm not sure you would classify it as a heated argument then, there wasn't no swearing, no cursing or anything like that but it was a heated argument. We could not come to no agreement on that one or nothing. I was opposed to her and she would not come to no agreement and the things she wanted I wouldn't come to an agreement on everything she said, although I did tell her that if it meant it rather than break up our marriage I'd give her everything I had, both automobiles, our home and everything that was in it but she said no, that's not what I want. Then she went on to say . . . said, "Mother has said the same thing", that she shouldn't do it that this should be the end of it, that she said go ahead and divorce, of course the divorce, I had the papers and had had them for a week or ten days or more and the case was supposed to come up in court the 22nd, the 22nd of September, and she was asking for a hundred percent settlement in everything.

Q And what was said concerning that during that phone conversation?

A Well, she said that she wanted everything just like the papers stated, she wanted . . . this was one of the things that I told her I would agree with on that, about her wanting a divorce, but I did stipulate at one time, I said, "well, if that's what you want and there's no other alternative", I said, "I won't contest it", but I said "I do not want a divorce and I did not want a divorce.

Q O.K. What did she say?

A She said "well, I'm still going to let things go as they are to the 22nd", she says "we'll settle that in court". I said "well, if that's the way you feel about it I'm going to have to get a lawyer myself", which I did not. I didn't have one at that time, but I said, "I'm going to have to contest it, the property value . . . the part of the property, you're wanting a hundred percent of the whole thing and I'm going to contest that with a lawyer if I have to", and she says "well, I don't see any further need of us talking

and arguing because you're not going to listen to me and I'm not going to listen to you so we'll just forget it at that", and she hung up on me. And that's when I hung the phone up. I remember hanging the phone up. There was a phone in the kitchen on the kitchen wall, a black phone, I remember hanging it up and . . . well, I felt let down or distraught at that particular time and things just went out, that's the last thing I remember, when I came to it was either the first day . . . it was either the 21st or the 22nd, I'm not sure which but I came to in a jail cell here in the Polk County jail, upstairs.

Q Can you remember even now anything?

A Not anything of the events. The first thing that I remember after this my brothers, I believe, and I'll say the sheriff, or one of the men, I'm not sure but I think it was the sheriff came up the next day, or the second day, I'm not sure which it was, and they came to me . . . both of my brothers talked to me and one of them asked me, he says, "do you know what you've done" and so I knew something was wrong. I says, "Well, there's got to be something wrong I'm locked in jail and they don't put you in jail for going to Sunday School," and he says "yes, you've killed your wife and your mother . . . mother-in-law rather".

Q There's not any doubt in your mind that you did shoot them is there?

A No, there's not.

Q Now, when you went to see Dr. Davis the first time, I think on the 24th, the court signed an order and the deputies took you over there, were you forthright and honest in everything you told Dr. Davis?

A Yes sir.

MR. PERREN: Your Honor, I object to that. That's a conclusion and a fact that ultimately must be determined by the jury as the tryor of facts. It invades the province of the jury.

THE COURT: It is somewhat subject to that objection. I believe in view of some of the testimony of the doctor that I'll allow him to answer it.

Q Did you answer all of his questions as best that you could?

A Yes sir, to the best of my ability I did.

Q When he talked to you did he inform you that there was further testing that might be able to reveal more to your memory.

A Yes sir, he did mention that there was other tests that might help me, or might bring out something in this respect one way or the other, if I was willing to take it and if the court would permit it. I don't remember the exact words of the court or the time for me, but I said "I'm willing to take anything to bring this back. I'd rather. . . I know it happened but in my mind I'd like to have a reality of it", and this is what I don't have.

Q Now, after you left Dr. Davis' office, before you went back the second time, did you have occasion to discuss the further testing with me before you went back to Dr. Davis as to whether or not you should take that test?

A Yes sir, you did.

Q Now, did you understand at the time the nature of the test, that he would put you under sedation?

A Yes sir, I did. I knew that Sodium Amytal was to be used.

Q And were you informed that while you were in that state that you would be questioned thoroughly about all that he had asked you questions about before?

A Yes sir, I did.

Q Did you understand that under that drug you might be able to tell things that you could not recall in a conscious state?

A Yes sir.

Q Did you understand that under that drug the doctor would be able to determine whether or not you were truthful?

A Yes sir.

Q And you did go back over to Atlanta with the deputies pursuant to the court order?

A Yes sir, I did.

Q And subjected yourself to the test?

A Yes sir, that's correct.

Q Did you love your wife?

A Yes sir, I did.

Q Since the 20th of September have you, while you've been in the cell have you tried as best you could to bring back any recollections?

A Many times.

Q Have you been able to recollect anything. . .

A . . . No sir.

Q . . . other than as you have testified here today?

A No sir. I wish to God I could.

MR. HOLMES: Your witness.

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TESTIMONY OF DR. ROBERT WILDMAN

DIRECT EXAMINATION

BY—MR. PERREN

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MR. PERREN: No Sir, I. . . Mr. Wildman has got away from my question. I would like to withdraw the question.

THE COURT: All right.

MR. PERREN: So much of his answer thus far has been before the jury and we'll start over.

Q What does the record reveal was the purpose, and the treatment for in the periods of hospitalization in 1957, 1966 and 1971?

A In '57, my understanding of the law at that time is that he was committed by someone else who described what the problems were. I don't believe. . .

Q . . . Well, my question is what purpose was he treated. . . for what particular thing was he treated at that time?

A I am not certain that, after reviewing the '57 records, that Mr. Godfrey was really complaining of any problems at that time.

Q Well, the question of course. . . can you tell us whether or not it was from a mental disorder or an alcohol problem?

A It was the psychiatrist's judgment in '57 that Mr. Godfrey did not have a serious mental disorder.

MR. HOLMES: Your Honor, I hate to keep interrupting Mr. Wildman but it seems to me he's getting into testifying for other parties.

MR. PERREN: I don't. . . I'll withdraw the question.

THE COURT: I'll let that be stricken.

Q Well, my question is simply this, doctor, what treatment was given him at that time and to what sort of problem did it relate, mental disorder or alcoholism?

A I believe the best answer to that would be a combination of the two.

Q And what was the primary thing?

A I don't believe that any definite decision on that was made.

Q All right. Now, in 1966 what was the purpose of his being in the hospital and what was he treated for there at the hospital?

A Well, now in '66 we have a definite diagnosis that was agreed upon, and that was depressive reaction.

Q And was that related to the use of alcohol?

A Yes, there were some alcohol related problems that were dealt with at that time.

Q Now, what is a depressive reaction?

A That is a response to some type of loss or stress in the environment that is characterized by persons feeling down and often people use the expression blue, lose interest in things, become dejected.

Q And then in the period in 1971 what problems was he treated for?

A That was again related to depression.

Q And was that diagnosed as depressive reaction?

A I think the term at the time was chronic depressive reaction.

Q That means he was depressed a lot?

A I believe that would be a correct way to put that.

Q Is there any indication, or was there any indication, in the records that you reviewed of any psychosis or insanity at any time in the past?

A None whatever to the best of my knowledge and recollection.

Q All right. Now, of course at the time you made your tests and examination were you aware of the fact that he was alleged to have killed both his wife and his mother-in-law by blowing their heads off with a shotgun?

A We were.

Q Did you have any interview with him concerning this episode in his life?

A Oh yes, we asked Mr. Godfrey about his mental status in general and then about the alleged offenses in particular. This is standard procedure for us.

Q Now, did you. . . what did he relate to you'all with regard to this particular action of his?

A He related to us a telephone conversation on the day that the women allegedly were killed in which his wife conveyed to him her feeling that their marriage could not be reconciled and that she was in fact going to go ahead and divorce him. He related hanging the phone up at this point and he related waking up in jail and being told by the individuals in jail what had happened, that he had in fact shot the two women.

TESTIMONY OF DR. CARL L. SMITH

DIRECT EXAMINATION

BY—MR. PERREN

WITNESS—DR. CARL L. SMITH, duly sworn.

Q Would you state your name please sir?

A I'm Dr. C. L. Smith.

Q What is your profession or occupation at the present time Dr. Smith?

A I'm employed by the Department of Human Resources, Forensic Services Center at Milledgeville State Hospital.

Q How long have you been employed by the State in the Forensic section at Milledgeville State Hospital?

A Since 1973. Five years.

Q What is your educationAL background Dr. Smith?

A Emory University, Medical College of Georgia, interned at Crawford Long and Grady Hospital in Atlanta, four years of private practice, general practice in Grady County, Georgia, in 1956 began a psychiatric residency at the Talmadge Hospital in Augusta which covered a period of five years, and then came to Milledgeville State Hospital in 1961, was in charge of the veteran's unit from 1961 until 1973. From '73 to '78 has been in the forensic services.

Q Now, when did you earn your medical doctor's degree?

A In 1951 at the Medical College of Georgia. Licensed to practice medicine, surgery and psychiatry in the State of Georgia. License number 6478.

Q And when were you licensed to practice?

A In 1951.

Q After having earned your M.D. degree did you have a residency in psychiatry at some hospital?

A At the Talmadge Hospital . . . Eugene Talmadge Memorial Hospital in Augusta, that plus work at the VA Hospital, Forrest Hills Division, VA Hospital, Glenwood Division, University Hospital plus the Talmadge Hospital, and that was three years residency and two years of required hospital psychiatric practice.

Q Now, after your college and residencies during your general practice what was the nature of the practice that you followed Dr. Smith?

A In Grady County?

Q Yes sir.
A Well, I delivered eleven hundred (1100) babies down there in four years, and did general medicine and surgery, orthopedics, pediatrics, all of it because the phsyicians that were in that particular county and area we were all that were there and we had to take care of the people in that area. We sent some to Thomasville, a few to Tallahassee.
Q Since that time have you engaged completely in the practice of psychiatry doctor?
A I have.
Q Now, in your . . . what is the function of the Forensic Services Center at Central State Hospital Dr. Smith?
A Well, people are sent to us from all of the Superior Courts in the State of Georgia for examination, observation, evaluation, and an opinion as to whatever is requested in the court order. Usually on court competency and criminal responsibility.
Q All right sir. Now . . .
A . . . Now, we get about . . . we've got a flow through of about eighty a month through the Forensic Services Center, we also get people from the prison system, Reidsville and Jackson Diagnostic and Colony Farm, Alto Youth Development Center, people that become disturbed and we get them for treatment and then return them to the prison system.
Q Now, in your capacity as a psychiatrist at the Forensic Services Center there at Central State Hospital have you had an occasion within the last month to see, examine, interview, and evaluate the defendant Robert Franklin Godfrey?
A I have.
Q Prior to that time that you saw him within the last month have you ever seen him before?
A Yes.
Q When was that Dr. Smith?
A I can document that in the records, in 1966 in the Veteran's unit, and also in 1971 in the Veteran's unit, and I made a note on each occasion.
Q Now, at the time you saw him in 1966 in the Veteran's unit there at Central State Hospital what treatment regime was initiated for him?
A In 1966?
Q Yes sir.
A I would have to look. I don't recall exactly the

treatment. Well, you might say medication and treatment for alcoholism and depression with different medications plus perhaps some therapy from the nursing staff or attendant staff and that type thing. I didn't . . .
Q . . . At that time, as you recall from having reviewed your records doctor, can you tell us whether or not there was any indication of his suffering from any psychosis?
A None that I could document or find.
Q Then what would be the primary reason for him having been hospitalized at that time?
A Well, at that time he had been drinking excessively and was depressed, and according to information furnished by relatives had been violent and irresponsible, had been acting out on anger, and resolving his depression in part by drinking.
Q By drinking?
A Yes.
Q Now, in 1971 what treatment, if any, was he given there at the hospital?
A Treatment for the same situation. He was transferred from there to the VA Hospital in Murfreesboro, Tennessee.
Q Was that in '71 or '66?
A In '71, I think it was. Either in '71 or '66, one of the two.
Q And what is the nature of the treatment that is given a person who abuses alcohol there at the hospital?
A Well, ordinarily insofar as the physicians and nursing staff is concerned it's kind of a superficial type of treatment with medication and activities. Insofar as in the individual therapy is concerned that very seldom happens in an alcoholic, like joining AA groups and that type of thing, but insofar as individual therapy is concerned in my recollection we just didn't do individual therapy on alcoholics. It was more of a drying out process, and then a stablizing and leveling off.
Q All right. On either of these occasions in '66 or '71 when you saw him was there anything about any treatment or interviews that you had with him that would indicate the existence of any psychosis?
A No, nothing in the record in '66 or '71 that indicates any sort of psychosis or insanity, using those terms interchangeably as having the same meaning.
Q Now, when he was at the hospital the last time do

you recall when he first came there?

A Yes, on February 15th, and he was there until February 23, a period of seven days.

Q During that period of time did you make examinations, have interviews and tests of his mental capacity?

A Twice.

Q And what tests, or what was done in an effort to determine his mental condition and capacity Dr. Smith?

A Well, on admission of course he had a physical examination and an admission note and then routine laboratory procedures were ordered, an electroencephalogram or brain wave test was ordered, skull x-ray requested, complete psychological testing was requested and he was put on some medication for his tension anxiety and/or depression.

Q Now, what is the function of the electroencephalogram?

A Well, that's an electrical instrument or device to measure brain wave activity and primarily it is to try and determine if there is any organic brain damage, or if there is not any organic brain damage.

Q What was the result . . .

A . . . In this instance Mr. Godfrey had a normal electroencephalogram.

Q Which would indicate what?

A Which would indicate no organic brain damage insofar as the EEG is concerned.

Q What would be the purpose of the skull x-rays, the skull series?

A To try and see if there was any indication of a space occupying lesion, any indication of dilation of ventricals, any indication of post skull fracture, and in this instance the skull x-ray was negative except for sinusitis, I think, in the right maxillary sinus. The tables looked good, the inner and outer tables of the skull, the sells turcica where the pituitary gland sits that was normal, and there just wasn't any pathology on skull x-ray except perhaps sinusitis.

Q Now, what other examination was had with regard to his physical condition?

A Well, a physical examination was done, blood pressure was checked, past history taken of course, and he did have a hypertension, you might say hypertensive cardiovascular disease, his blood pressure was running up around 190/140, and he was put on a diuretic, Hygroton

and Aldomet, another medication for blood pressure, and on the last reading it was 140/90. It previously had been running around 190/140 or 180/120. And then he was on a diabetic diet which controlled his mild diabetes. Now, I notice back in 1966 that I requested a repeat urinalysis and fasting blood sugar because it was showing a normal blood sugar but a four plus urine sugar so I would imagine this diabetes could be documented that far back.

Q All right . . .

A . . . So then he had a sub total gastrectomy, a history of duodenal ulcer or peptic ulcer, and Mr. Godfrey had a sub total gastrectoly, I forget where he had that, maybe in the VA Hospital or some hospital.

Q Now, a sub total gastrectomy, that was for the treatment of a peptic ulcer?

A That's correct.

Q And removal of the ulcer?

A That's correct.

Q Was any part of his stomach removed at that time?

A On a sub total part of the stomach is removed, and the doudenum . . . part of the duodenum.

Q Now . . .

A . . . The first part of the small intestine.

Q Now, was he found, from a medical standpoint, to have any physical disease or sickness other than the mild diabetes, the high blood pressure or hypertension, the fact that he had had a previous gastrectomy . . .

A . . . That's all except mild obesity, slightly overweight.

Q Now, what test was performed on him doctor from a psychiatric standpoint to determine his mental condition?

A Well, he was seen by the forensic group, I was present, and he was seen by Dr. Wildman and I, I was present, and that covered a period of two hours approximately, and then our information from the attendants, from the psychiatric nurse, observation on the ward, and during . . . when he came in and during his seven days he manifested no symptoms of any sort of abnormal behavior, abnormal thinking, or abnormality of effect, and to have a psychosis you've got to have all three of those.

Q Then based upon these observations and examinations what was your opinion at the time you saw him as to his capacity to understand and relate to reality?

A During his entire seven days that he was in the forensic center he was reality based.

Q Doctor, were you made aware, as a psychiatrist, of the fact that he was charged with two counts of murder and an aggravated assualt, including the death of his wife, the death of his mother-in-law and an assault upon his eleven year old daughter?

A Yes, this was in the court order.

Q And . . .

A . . . This was at the top of the court order. I was aware of it anyway.

Q And at that time were you made aware of officers investigation reports and certain statements relating to the incident contributed to the defendant himself?

A I had that information.

Q Now doctor, based upon a . . . well, let me ask you this hypthetical question. Assuming these facts were true, that on the day in question, of the occurrence itself, a man arose at the usual hour in the morning, attended to himself, shaved, dressed, made his breakfast and went to work, worked at Northwest Regional Hospital all during the day where he discussed a marital difficulty and separation from his wife that was existent at that time with a fellow employee, made a statement to that employee that it would all be over by the 21st, which would be the next day, left his work at three thirty that afternoon and came home, performed certain activities around the house, discussed the marital situation and property division and settlement with his wife over the telephone on two occasions, went to the store to obtain small items of groceries that he needed such as luncheon meat, bread, milk, and apples, stopped by his son-in-law's house at the request of his son-in-law or upon being hailed by his son-in-law to examine a snake his son-in-law had killed, and could relate the route that he took to the store, from the store to a stop there, what kind of snake that was, whether it was a poisonous or non poisonous snake, went out into a grove there at home and took a ladder from against a tree so that some of the kids would not be hurt by climbing around on the ladder, watched television or at least listened to some news, of course, on television, looked at an encyclopedia, then at the time of the last conversation with his wife became convinced that his wife was not going to reconcile with him, that he was not going to be able to settle the property dispute with her, he told her that he's just have to get him a lawyer, and got into an argument that was heated enough that they were getting no where, where

she hung up the telephone, and at that time he realizes that there is to be no reconciliation that they're going to court in connection with their domestic difficulties, then afterward goes to a closet where he has three differrent guns . . . four different guns at least, three of which were shotguns, a 410 gauge, a 16 gauge, both single shots, a 20 gauge Magnum with a 22 Magnum rifle barrel on top of that 20 gauge, where there were a number of different size shells, 410's, 12's, 16's, 20's, and gets a gun, the 20 gauge Magnum, gets shells for those guns, which he says is never loaded while it's on the shelf in that closet, goes to his mother-in-law's house where his estranged wife is staying a hundred and twenty five yards away, in the darkness goes to a garage or carport behind that trailer down there where there is a jalousie window open, aims that gun through the screen to a point where his wife, his eleven year old child, and his mother-in-law are seated playing Rook, and fires that gun into his wife's forehead blowing her head off, or blowing her head into mush in the back, and then when she falls over on the table there . . . at the table, the little girl runs and his mother-in-law jumps up and begins to scream, she runs out the door and he hits her on the head . . . the little girl on the head with the barrel of the gun while she is attempting to get away from the trailer to go to her sister's house some thirty or fifty years away, then ejects the shell from the chamber at some time then goes into the trailer after reloading the gun with another 20 gauge shell, fires again into the head of the mother-in-law at a range so close the pellets as they tear into and out of her head blow a part of her skull six feet away from where her body falls and her brain out into the floor a foot or so from the top of her head. Then picks up the telephone, or takes the phone off the wall in that trailer and dials the number of the sheriff's office in Cedartown and talks with the man at the desk and gives him his name, he's Robert Godfrey, tells him that he has just blown his wife's and mother-in-law's head off with a shotgun, and when asked where it was he told that it was at the residence of Mrs. Chessie Wilkerson, his mother-in-law's, out on Collard Valley Road seven and a half miles from Cedartown on the right hand side of the road going out, when asked what the telephone number was he correctly related the telephone number to the officer at the desk. Then takes the shotgun which has again been unloaded and places it in an apple tree out there, goes and

sits down in a lawn chair. The officers arrive, a uniformed officer . . . two uniformed officers that he recognizes and knows, he tells . . . makes the statement "there's no need to go up there, they're both dead, I killed them". Then makes the statement "I'll show you where the gun is", carries the officer to see where the gun was placed in the forks of a tree, apple tree, then when seated in the patrol car after having been taken into custody the sheriff arrives, he recognizes him, calls him by his first name, says "I understand that you called the office and wanted me to come out here, is there something I can do for you", he makes the statement "no, there isn't anything now it's all over, it's all done". Then later when brought to the police headquarters out here in a lounge area where there is a coffee maker and a table where he asks the officer, another officer by the name of McLendon who he knows personally, for a cup of coffee and is given a cup of coffee makes the statement "Mac, I've done a hideous crime, I've been thinking about it for eight years. I would do it again". Now, assume those things occurred doctor, tell us whether or not from your examination of the patient and your interviews those would be the actions of a man who knew the difference between right and wrong.

A In my opinion he would know the difference between right and wrong.

Q Would that contact with the reality of the situation at that time indicate whether or not he was able to . . . if he was able to distinguish between right and wrong, whether or not he was able to adhere to the right?

A He could adhere to the right.

Q And was there anything in the history that you have had or the past observations that you have made, or the examinations made in February this year, February 15th to the 23rd, to indicate to the contrary at the time of this incident?

A He was functioning at . . . in my opinion at a conscious level, reality based.

Q And these activities which I have mentioned to you doctor are those activities which could, in your opinion as a psychiatrist, and having examined this man activities that could be done unconsciously from a mental view point?

A No.

Q Would you tell us whether or not in your opinion these deliberate actions would require some conscious contact with reality?

A They certainly would. Certainly remembering the telephone number, giving directions to the sheriff's department, in fact it's just that this was all on a conscious level it wasn't on any unconscious or on the level of any sort of mental illness insofar as I can determine.

Q Would there be any reservations whatsoever in your mind from a professional standpoint as a psychiatrist as to whether or not he could distinguish between right and wrong at the time these actions had taken place?

A There would be no reservation whatsoever.

Q Would there by any reservations whatsoever as to whether or not at the time these actions were taking place he was in a condition where he could not for any reason adhere to and follow that which was morally right had he decided to?

A He could have.

MR. PERREN: I have no further questions.

CROSS EXAMINATION

BY— MR. HOLMES
WITNESS—DR. CARL L. SMITH

Q Doctor, you mentioned that when the defendant came down to the hospital down there in Milledgeville that you performed some tests on him. Did you conduct these yourself?

A Well, no. The tests were requested by the admitting physician, which is routine or usual, and then those tests are done and we see the results and then we use them in our evaluation.

Q You're talking about the physical tests?

A That's correct.

Q Now, there were some further tests run and examination or further interviews. Tell us what you did in that respect?

A Well, this was with Dr. Wildman on one occasion and with the forensic group on the other occasion.

OPENING ARGUMENT TO THE JURY

BY—MR. PERREN

Your Honor, may it please the court, the indictment and special presentment in this case is drawn under the provisions of Code Section 26–1101 of the criminal code which

defines the offense of murder, and that provides in sub section (A), a person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Sub Section (B) provides, a person also commits the crime of murder when in the commission of a felony he causes the death of another human being irrespective of malice.

Now, the special presentment in this case is drawn in such a way as to include both the malice murder and the felony murder as defined by sub section (A) and (B) because it is alleged that he did on the day in question, that is Robert Franklin Godfrey on the 20th day of September, 1977, with malice aforethought and while making an aggravated assault upon the person of Mildred Godfrey with a deadly weapon, the same being a shotgun, caused the death of said Mildred Godfrey by shooting her with said shotgun contrary to the laws of the State, the good order, peace, and dignity thereof.

Now, as alleged the felony that we contend and allege that he was committing was that of aggravated assault which is defined by Section 26-1302 of the Criminal Code of this state. That provides "a person commits aggravated assault when he assaults with intent to rob, to rape, or to murder, or with a deadly weapon". Of course it is alleged in this case that he did make an assault with a deadly weapon, the same being a shotgun. Now, a shotgun is recognized under the law and the precedence and the decisions of the Supreme Court in this state as being per se, that is in and of itself, a deadly weapon.

In count three he's charged with an aggravated assault upon his daughter, Tracey Godfrey, which also is defined by Section 26-1302, alleging that that assault was made with a deadly weapon, being a shotgun, with which he struck her on the head with the barrel with the intent to murder her. And on that count the evidence has shown that prior to the time that the little girl was struck on her head with the barrel of the shotgun used in this case that that same gun had been used to shoot Mildred Godfrey in

the head as she sat at the table inside the trailer where her mother lived and where her and her young daughter were playing cards with her mother.

Of course now a crime is defined as a violation of a statute of this state in which there shall be a union or joint operation of acts or omission to act and intention or criminal negligence. The code also provides that the acts of a person of sound mind and discretion are presumed to the product of a person's will, but the presumption may be rebutted. It also provides in Section 26-604 that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted. It goes on to provide in Section 26-605 that a person will not be presumed to act with criminal intention but the tryor of facts, that is the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. It goes on to give another presumption in Section 26-606 as provided by the law of this state that statutorily every person is presumed to be of sound mind and discretion but the presumption may be rebutted.

Now, in regard to malice and intent there are numerous cases in this state which provide that every homocide is presumed to be malicious until the contrary appears, and this is true regardless, and is the law regardless of the manner used to complete that homocide. As I have already stated the law is that a shotgun is recognized by the law and the presses and courts of this state, and the courts of any other states that I know of in civilization, to be a deadly weapon per se. Now, it's not necessary that malice exist for any period of time. Our courts have held that malice is the deliberate intention to take away the life of a fellow creature. In Crawford versus the State our Supreme Courts have held that malice in law does not mean that the slayer entertain any hatred, ill will, ill feeling, or anything of that character toward the person killed. It means intention to take human life under such circumstances that the law will neither justify, excuse, or mitigate. A man may kill another against whom he entertains no ill will, maybe a stranger to him, yet be guilty of murder. No particular length of time is required, it may be formed in a moment and instantly a mortal blow may be given or a fatal shot fired yet if malice is in the mind of the slayer at the time of the act and moves him to do it it is

sufficient to constitute murder.

Now, these are cases that have to do with malice. Under our law it is not necessary in every case that malice be shown because where a person causes the death of another human being while in the commission of a felony it makes no difference whether there is malice or not. When a person takes a shotgun, a deadly weapon per se, and points it at another person and is within a position where he is then making an assault he has the means to produce death in his hands, that gun is loaded and he makes an assault at that time and then death results from the assault thus made it makes no difference if he had no malice it is still murder irrespective of the existence of malice.

Now, of course the idea has been presented in this case of insanity as a defense to the criminal acts alleged against Robert Franklin Godfrey and overwhelmingly shown by the evidence thus produced. That can be found in Code Section 26-702 which provides that a person shall not be found guilty of a crime if at the time of the act, omission, or negligence constituting the crime such person did not have mental capacity to distinguish between right and wrong in relationship to such act, omission, or negligence. That being the old McNaughten rule as adopted by the courts of this state many years ago. That is the only excuse for a person being relieved from the crime and responsibility of his act, is at the time of his act he is not able to distinguish the difference between right and wrong. And another feature of the insanity defense, and the only other feature recognized under the law, is that defined in Section 26-703 of the Criminal Code of this state which provides "A person shall not be found guilty of a crime when at the time of the act, omission, or negligence constituting the crime such person because of mental disease, injury, or congenital deficiency acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime", and in that regard there is a case found in 236 Georgia Supreme Court Reports which has been decided by our Supreme Courts within the last year. It's found at page 378 of volume 236 Supreme Court Reports. It says that the Supreme Courts of this state which provides what the requirements are before the defense of delusional insanity, as I have just stated, is available to a defendant in a case. They said in that case in order for a defense of delusional compulstion to be available in trials of murder there must

be evidence that the defendant was laboring under a delusion, that the act itself, that is the murder, was connected with that delusion and furthermore that if the delusion under which he was then suffering, if true, would justify the act. And of course there is no such thing involved in this case as delusional insanity because he. . . there's no evidence that he was suffering under any delusion, that the delusion was related to the act which he committed, or that the delusion of the existence of facts, if they had been in fact true, would have justified the act.

Now, in regards to criminal responsibility of a person who claims the defense of insanity there is a case that is as near this one as you can make two cases, the case of Rebel versus the State found in the 235th volume of Georgia Supreme Court Reports beginning at page 71. The case was tried. . . or was decided in September 1975, some three years ago. The law enunciated in that case is still applicable in this state today. In this case the very factual situation as existing here except there was only one killing in that case. Rebel killed his wife and when the police got to his home where the killing took place. . .

MR. HOLMES:. . . We would ask that Mr. Perren read from the law Your Honor, on the case law.

MR. PERREN: When the police arrived the appellant surrendered to them and turned over the death weapon, saying, here's the gun, I killed my wife. Then the court said, in reviewing that case, after a conviction, held that from the evidence of premeditation discussed above and evidence at the trial that the appellant had an extremely retentive memory of the events before and after the event coupled with the absence of any evidence of insanity or delusion other than the alleged loss of memory at the time of the offense we cannot say that the evidence demanded a finding of not guilty by reason of insanity. The exact case, exactly like this except for the fact that there was only one person, the man's wife, dead and he could remember nothing about the shooting, or denied any memory of the shooting.

These are principles, Your Honor, that we feel are involved in the case and that the court will instruct the jury upon before they commence their deliberations. With those remarks I would reserve. . . make a concluding summary of the evidence to the jury.

(Mr. Perren concludes his opening argument to the court and jury)

* * * * *

POLK SUPERIOR COURT

CASE NO. 1946
THE STATE

vs.

ROBERT FRANKLIN GODFREY

COUNT ONE

We the Jury find the Defendant Not Guilty.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Not Guilty by reason of insanity.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Guilty.
This March 9, 1978.

Mack G. Moore
_____
Foreman

COUNT TWO

We the Jury find the Defendant Not Guilty.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Not Guilty by reason of insanity.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Guilty.
This March 9, 1978.

Mack G. Moore
_____
Foreman

COUNT THREE

We the Jury find the Defendant Not Guilty.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Not Guilty by reason of insanity.
This March 9, 1978.

_____
Foreman

We the Jury find the Defendant Guilty.
This March 9, 1978.

Mack G. Moore
_____
Foreman

We the Jury find the Defendant Guilty of Simple Battery.
This March 9, 1978.

_____
Foreman

FILED IN OFFICE
This 9th day of March 1978
S.W. GALLOWAY, Clerk

CLOSING ARGUMENT TO THE JURY

BY—MR. PERREN

Your Honor, may it please the court, the same statutes of this state that defines the offense of murder also provides for punishment. It provides that a person convicted of murder shall be punished by death or by imprisonment for life. Of course that's giving an alternative which must be determined by the jury. However in the case of Perry versus the State, an old case decided in 1897, eighty years ago, our courts recognized the way the statutes today are still written, recognized and stated that the penalty of death was brutal and that a life sentence or life imprisonment was the exception. Of course there have been some changes in our laws since 1897 with respect to this type punishment, punishment in a case such as that now before the court, within the last few years we have seen considerable changes about the law regarding capital punishment including the decisions of the Supreme Court of the United States and in the past three years one from Georgia being the case Furman versus the State wherein the court held that the death penalty was constitutional under the law as it is presently cast in this state.

Of course in order for the death penalty to be inflicted and in order to make the death penalty itself comply with the mandates of the Supreme Court of this country the State of Georgia through its General Assembly passed a statute requiring that before the penalty could be inflicted, that is the penalty of death, that. . . and this is Section 27-2534, one of the criminal procedure codes, (a) the death penalty may be imposed for the offense of aircraft hijacking or treason in any case. (b) In all cases of other offenses for which the death penalty may be authorized the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law, and any of the following statutory aggravating circumstances which may be supported by the evidence. Of course it lists then ten statutory aggravating circumstances, many of them are not involved in this case, in fact there is only one of the aggravating circumstances enumerated by the laws of this state which applies in this case, that is the seventh enumerated under the general statutes which provide, the offense of murder, rape, armed robbery, or kidnapping was outrageously or wan-

tonly violent, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Now, of course in this case it is not the contentions of the State that the murder in this case involved torture, or that it involved an aggravated battery in the sense in which it is defined by our criminal code, but we contend, and it is the law in this state, that it's not necessary that all of these things be found by the jury, only that some of these circumstances be found. And we submit to the court that in this case the murder was outrageously wantonly vile, that it was horrible, and inhuman and involved a depravity of mind. If those things be found by the jury then those are the things which authorize and not only under the law since the imprisonment for life is the alternative, but they dictate the imposition of the penalty of death.

Ladies and gentlemen of the jury you have heard remarks I have made to the court regarding the law and of course you will be authorized, and in order to in the process of establishing a punishment which you feel is applicable in this case it is necessary, mandated by the law, that you as jurors find some aggravating circumstance and make it a part of your verdict. The aggravating circumstances, in determining that, you must determine whether or not the killing, or the killings, in this case were outrageously and wantonly vile. And you must determine whether or not they exhibited and manifested depravity of mind, and whether or not they were horrible and inhuman.

Of course you cannot find there was torture. There wasn't any torture. It was sudden. There wasn't any torturing of anyone prior to or after the blast of the gun that took away the life of Mildred Godfrey or the blast of the gun that took away the life of Mrs. Chessie Wilkerson. What do they exhibit to you? Of course they didn't involve any aggravated battery because that was not involved under the law of this state. Of course aggravated battery would be crippling or maiming or disfigurement of a person, like cutting off a leg, putting out an eye, or something of this nature.

But now what do the facts exhibit to you? And they are all of the facts that you will have to consider when you go out there to make a determination. The court is required under the law to give you a charge in writing concerning this which you may use as a guideline, and that aggravated circumstance must be set forth within that written

charge that you'll carry to the jury room with you. Don't worry about torture. There wasn't any. Don't worry about an aggravated battery. But now when you look at the wording of that aggravated circumstance, and you must find it beyond a reasonable doubt, and your foreman will be required to write out a verdict setting forth the aggravating circumstances which you find. You can set out the fact, under the facts and the evidence in this case, that the murder as to each case was outrageously and wantonly vile. You can set out as to each one that they were each horrible and inhuman, and that they exhibited, and the manner in which they were executed exhibited a depravity of mind. Those three things are there as evidence. Beyond any doubt, reasonable or otherwise, when you sit you look again at those photographs, horrible and vile though they seem, and a scene portrayed that you wish your eyes never fell upon, but they tell you something. They tell you something you can't run from, you can't hide from, you cannot escape from, and then when your eyes fall upon them again when you go out there to consider punishment you think about the nonchalance and the lack of concern shown by the defendant when he cast his eyes upon them and didn't care, not one glimmer of feeling or concern or care. At no time a glimmer, even a little light of remorse or concern or care.

You think about the outrageously and wantonly vile manner in which the deaths of Mildred Godfrey and Mrs. Chessie Wilkerson came about as the result of the depravity of mind and the bitterness, even hate, you can see exhibited by the conduct of this man here on trial. You know something, when you think about the vileness and the wantoness and the depravity of mind exhibited by it all can you close your eyes, ladies and gentlemen, and think of a load of number four shot tearing through your forehead and the shots spreading out from this fractured skull and coming through the entire internal section of the brain and just liquefying and blowing the back of the head off. Close your eyes and see if you can feel it. Close your eyes and look at the belch of flame from the barrel of that twenty gauge gun. You know you say you can't see the state of mind or the feeling of man, you can't look into his brain and see it, but you can see the state of mind of man who is bent on killing and taking away lives if you can just see the belch of smoke and flame from the end of that barrel. Do you suppose Mildred Godfrey even got a chance to

see? I hope to God she didn't. I hope she didn't see the face behind the butt of that gun with the barrel pointed toward her and it belched flame and smoke. That's malice in living color.

And then you are going to hear about, oh no, you can't do this, you can't take away the life of a man. Yeah, that's right, that's the law, except by the law itself. You all indicated that you believed in capital punishment. It's a lot easier to believe in it at the drug store having a cup of coffee or out on the street than it is sitting in a jury box, and that's the only place where it really matters. It's easy to disbelieve in it if you're a do-gooder sitting somewhere in some moral palace where you're protected from the ravage of malice, street happenings and such as that, and things that happen like they did here on the 20th day of September. But if you could call back the still tongues and unseal the lips of Mildred Godfrey and Mrs. Chessie Wilkerson and ask them, well, what do you believe, what do you suppose they'd tell you if they could tell you the feelings they had when the pellets from that shotgun blast tore into their heads?

And you're always bombarded with the idea of mercy, mercy. Everybody always at a time when their own life may be demanded of them they always scream "mercy to me", "mercy on me". But now let me ask you something in all candor and sincerity, did Mrs. Mildred Godfrey or Mrs. Chessie Wilkerson either one even have an opportunity to even beg for mercy, or ask for it? And did they receive any mercy? And the person who has shown none deserves no more than he had been shown. . . or than he has shown to someone that he professed love for and could show not the first glimmer of concern over her lying dead on the floor.

Some learned scholar in and a jurist said once if men sow to the wind they cannot expect the courts and juries to interpose and prevent them from reaping the whirlwind. If passion without sufficient provocation is to excuse men from a crime and guilt of murder then is human life cheap indeed, of nor more value than a sparrow's. He went on to say that this is an age of Cain and the voices of murdered Abel's come up at every court, every court, crying aloud to the ministers of the law for vengence. There is no one else that they can cry to. There's no one that Mildred Godfrey can cry to, there's no one that Mrs. Chessie Wilkerson can cry to, you only must hear their voices from the grave crying out that you, me, and the ministers of the

law do something about the wantonly vile and horrible manner in which their lives were snuffed from them. And you know, the only thing that is going to still the cries and make the cries from the grave come to us less frequently is something else that he learned jurist said, and he said "let the stern response go out from the jury box that who so sheds man's blood so shall his blood be shed". That jurist did not think that up himself, that last portion of that came from the book of books, the rule and guide that we should follow with our lives, that we should use in the conduct of our affairs, even sitting on jury's, if we are to have liberty, if we are to have liberty and freedom that you heard about yesterday, it must be encased in the merciless hands of the law. That's the only way. That's the only way.

You as jurors have the responsibility of encasing liberty in the merciless hand of the law the acts of Robert Godfrey in this case. Outrageous and wantonly vile, exhibiting depravity of mind, horribly inhuman, and you should demand, if there be such a thing, or if there is ever going to be such a thing, you should demand of him his life under the law and in accordance with the law. Thank you.

CHARGE OF THE COURT

Ladies and gentlemen of the jury, it is now your duty to return to the jury room and fix the punishment in this case, as to Count One and Count Two.

Code Section 26–1101(c) provides "a person convicted of murder shall be punished by death or by imprisonment for life.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

In determining your verdict in this case, you shall consider any mitigating circumstances which you find and you may consider any of the following aggravating circumstances which may be supported by the evidence:

(1) That the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

In the event you fail to find an aggravating circumstance or circumstances beyond a reasonable doubt you would fix the punishment at life imprisonment, and even though you find the existence of a statutory aggravating circumstance or circumstances you could recommend a life sentence.

In the event you determine that your verdict will be a recommendation of death, you shall designate in writing the aggravating circumstance or circumstances which you found beyond a reasonable doubt.

CASE NO. 1946

POLK SUPERIOR COURT

THE STATE

vs.

ROBERT FRANKLIN GODFREY

COUNT ONE

We, the Jury, fix the punishment of ROBERT FRANKLIN GODEREY at Life Imprisonment.

This March___, 1978.

_____

Foreman

We, the Jury, fix the punishment of ROBERT FRANKLIN GODFREY at Death and designate as the aggravating circumstance or circumstances which we find beyond a reasonable doubt as follows: that the offense of murder was outrageously or wantonly vile, horrible and inhuman.

This March 9, 1978.

Mack G. Moore

_____

Foreman

FILED IN OFFICE

This 9th day of March 1978
S.W. GALLOWAY, Clerk

CASE NO. 1946

POLK SUPERIOR COURT

THE STATE

vs.

ROBERT FRANKLIN GODFREY

COUNT TWO

We, the Jury, fix the punishment of ROBERT FRANKLIN GODFREY at Life Imprisonment.

This March___, 1978.

_____

Foreman

We, the Jury, fix the punishment of ROBERT FRANKLIN GODFREY at Death and designate as the aggravating circumstance or circumstances which we find beyond a reasonable doubt as follows: that the offense of murder was outrageously or wantonly vile, horrible and inhuman.

This March 9, 1978

Mack G. Moore

_____

Foreman

FILED IN OFFICE
This 9th day of March, 1978
S.W. GALLOWAY, Clerk

IN THE SUPERIOR COURT
FOR THE COUNTY OF POLK,
STATE OF GEORGIA

CRIMINAL CASE No. 1946

THE STATE

vs.

ROBERT FRANKLIN GODFREY

SENTENCE OF THE COURT

The jury selected, impaneled and sworn to try the above named and stated case having found the defendant, ROBERT FRANKLIN GODFREY guilty of the offense of Murder as alleged in Count One of the Special Presentment and having found the defendant guilty of the offense of Murder as alleged in Count Two thereof, after which the jury was given instructions in writing as to Statutory Aggravating circumstances warranted by the evidence in charge as to punishment; and, the jury having found in their verdict as to punishment as to both Counts one and two that "the offense of murder was outrageoulsy or wantonly vile, horrible and inhuman" and having recommended punishment by death as to Count One and as to Count Two by their verdict on March 9, 1978, it is:

CONSIDERED, ORDERED, AND ADJUDGED that the defendant, ROBERT FRANKLIN GODFREY, be punished as to Count One by death by electrocution on the 14th day of April, 1978, at 11:00 o'clock, A.M., and that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director of Corrections, as provided by law in such cases; and it is:

CONSIDERED, ORDERED, AND ADJUDGED FURTHER that the defendant, ROBERT FRANKLIN GODFREY, be punished as to Count Two by death by electrocution on the 14th day of April, 1978, at 11:00 o'clock, A.M., and that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director of Corrections, as provided by law in such cases.

It is so ORDERED this 13th day of March, 1978.

DAN WINN
Judge, Superior Courts
Tallapoosa Judicial Circuit.

FILED IN OFFICE
This 13th day of March 1978
SANDRA W. GALLOWAY, Clerk

FELONY SENTENCE

The STATE OF GEORGIA vs. ROBERT FRANKLIN GODFREY, Defendant,

In the Superior Court, Polk County, Georgia.

Docket Number (s): 1946; Count(s): Three

OFFENSE(S)	DISPOSITION	SENTENCE(S) XXXXXXXXXXXXXXXXXXX
1. Murder	March 9, 1978 Verdict of Guilty	Death $
2. Murder	Verdict of Guilty	Death $
3. Aggravated Assault	Verdict of Guilty	10 YRS. $

Whereas the Defendant has entered a plea or been convicted of the charges as set forth above, IT IS HEREBY ORDERED that the Defendant be confined at labor for the term (s) specified above, said sentence(s) to be served in the State Penal System in such institution as the Director of Corrections may designate.

IT IS FURTHER PROVIDED that none (years)/(months) of the above sentence(s) may be served on (Probation)/(Suspension), PROVIDED that said Defendant complies fully with the conditions set forth in the Order of (Probation)/(Suspension), said Order to become effective _____

IT IS FURTHER ORDERED that this sentence shall apply as to Count Three, the Court having sentenced the defendant to death by electrocution as to Counts One and Two by a separate written sentence this date.

The Defendant, Robert Franklin Godfrey, was represented in this matter by the Honorable J. Calloway Holmes and Gerri Holmes,

Attorney at Law, Polk County.

FILED IN OFFICE
THIS 13TH DAY OF March 1978
SW Galloway CLERK.

By the Court, March 13, 1978
Dan Winn
JUDGE PRESIDING

Report of the Trial Judge

of the

Superior Court of Polk County, Georgia

The State vs. Robert Franklin Godfrey
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Godfrey, Robert Franklin (Last / First / Middle) 2. Date of Birth July 16, 1929 (Mo. Day Year)

3. Social Security Number 257 40 8077
4. Sex M [X] F [ ] 5. Marital Status: Never Married [ ] Married [ ] Divorced [ ] Spouse Deceased [X]

6. Children
(a) Number of children Four (4)
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 (12) 13 14 15 16 17 18 19 (20) 21 22 (Circle age of each child) (23) 24 25 26 (27) 28

7. Father living: Yes [ ] No [X] If deceased, give date of death Sept. 10,1978
8. Mother living: Yes [ ] No [X] If deceased, give date of death Aug. 24,1969
9. Number of children born to parents Three (3)
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 (Circle one) [college

11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [ ]

12. Psychiatric Evaluation Performed: Yes [X] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [X] [ ]
b. Able to adhere to the right? [X] [ ]
c. Able to cooperate intelligently in his own defense? [X] [ ]

13. If examined, were character or behavior disorders found? Yes [X] No [ ]
(If answer is yes, please elaborate) There was testimony that he had a non-psychotic dissociative condition, caused by the marital conflict.

14. What other pertinent psychiatric [and psychological] information was revealed

The weight of the medical evidence, apparently believed by jury, was that he was responsible.

15. Prior work record of defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	LPN I	$758.50 monthly	1950 to 1977	This case
b.	Above service at Northwest Georgia Regional Hospital was continuous except for short			
c.	breaks in service in 1957 and 1971.			
d.				
e.				

*A separate report must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

1. Was the case tried with or without jury? With [X] Without [ ]
2. How did the defendant plead? Guilty [ ] Not guilty [X]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:

a.	Treason	[ ]
b.	Murder	[X] Two Counts
c.	Kidnapping for Ransom	[ ]
d.	Kidnapping where Injury Results	[ ]
e.	Aircraft Hijacking	[ ]
f.	Rape	[ ]
g.	Armed Robbery	[ ]

2. Were other offenses tried in the same trial? yes [X] no [ ]
If other offenses were tried in the same trial list those offenses.
a. Murder (second count)
b. Aggravated Assault
c.
d.

3. If tried with jury, did the jury recommend the death sentence? Yes [X] No [ ]

4. Statutory aggravating circumstances found: Yes [X] No [ ]

5. Which of the following statutory aggravating circumstances were instructed and which were found?

		Instructed	Found
a.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
	(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or	[ ]	[ ]
	(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c.	The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d.	The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]

	Instructed	Found
g. The offense of murder, ~~rape, sexual abuse, robbery, coordinated kidnapping~~ was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Charged all of above except as marked out; jury found the part bracketed in red.	[X]	[X]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List nonstatutory aggravating circumstances indicated by the evidence, if any.

   a. _____

   b. _____

   c. _____

   d. _____

7. Was there evidence of mitigating circumstances? Yes [X] No [ ]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.	[X]
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]
f. The defendant acted under duress or under the domination of another person.	[ ]
g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.	[ ]
h. The youth of the defendant at the time of the crime.	[ ]

   i. Other.
   Please explain if (i) is checked _____

   _____

   _____

9. If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [X] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [X] No [ ]

13. If answer is yes, what was the relationship? One of the murder victims was the wife of the defendant and the other murder victim was the mother-in-law of the defendant.

14. Was the victim an employer or employee of defendant?
    No [X] as to both victims
    Employer [ ]
    Employee [ ]

15. Was the victim acquainted with the defendant?
    No [ ] YES-see #13 above
    Casual Acquaintance [ ]
    Friend [ ]

16. Was the victim local resident or transient in the community?
    Resident [X] as to both victims
    Transient [ ]

17. Was the victim the same race as defendant? Yes [X] No [ ] as to both victims

18. Was the victim the same sex as the defendant? Yes [ ] No [X] as to both victims

19. Was the victim held hostage during the crime?
    No [X] as to both victims
    Yes - Less than an hour [ ]
    Yes - More than an hour [ ]

20. Was the victim's reputation in the community:
    Good [X] as to both victims
    Bad [ ]
    Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [ ] No [X] as to both victims
    If yes, state extent of harm or torture: excluding the actual murdering of the two victims.

22. What was the age of the victim? One victim (defendant's wife) was 46. The other victim (defendant's mother-in-law) was 72.

23. If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm (Shotgun)	[X]
Other _____	[ ]

24. Does the defendant have a record of prior convictions? Yes [ ] No [X]

25. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

Offense	Date of Offense	Sentence Imposed
a. No prior convictions, but on September 7, 1977 (13 days before the murders)		
b. defendant's wife (one of the victims) charged the defendant with aggravated		
c. assault. No disposition ever made of this charge.		
d.		

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [X]

27. Was the defendant a local resident or transient in the community?
    Resident [X]
    Transient [ ]

D. Representation of Defendant *

1. Date counsel secured Sept. 20, 1977; Later Hearing on appointments Dec. 22, 1977.

2. How was counsel secured? a. Retained by defendant [X]
b. Appointed by Court [X]Conditional Appointment

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [ ]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) See attached

4. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [X]
c. over ten[ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [X]
c. Mostly criminal [ ]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. If not, explain in detail Originally J. Calloway Holmes and Henry Stewart were representing defendant but later Mr. Stewart was excused because of bad health. He was replaced by Mrs. Gerry Holmes with consent of and at request of accused.

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. What percentage of the population of your county is the same race as the defendant?
a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [ ]
d. 50 to 75% . . . . . [ ]
e. 75 to 90% . . . . . [X] (1970 Census)
f. Over 90% . . . . . [ ]

4. Were members of defendant's race represented on the jury? Yes [X] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [X]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [X]

7. Was there extensive publicity in the community concerning this case? Yes [ ] No [X]

8. Was the jury instructed to disregard such publicity. Yes [ ] No [X]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [X]

11. If answer is yes, what was that evidence?

12. In your opinion, was the death sentence imposed in this case appropriate? Yes [X] No [ ]

General comments concerning your answer:

F. Chronology of Case

		Elapsed Days
1.	Date of Offense September 20, 1977	0
2.	Date of Arrest September 20, 1977	0
3.	Date Trial Began March 6, 1978	167
4.	Date Sentence Imposed March 13, 1978	7
5.	Date post trial motions ruled on Aug. 22, 1978	162
6.	Date Trial Judge's Report Completed 11-14-78	
7.	*Date received by Supreme Court	
8.	*Date sentence review completed	
9.	*Total elapsed days	

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded ( )

November 14, 1978
Date

Dan Winn
Judge, Superior Court of

Polk County

FILED IN OFFICE THIS 16 DAY
OF November, 1978
SANDRA W. GALLOWAY, CLERK
BY: S W Galloway

3(c).

The Court, on information that the defendant was indigent, appointed J. Calloway Holmes and Henry A. Stewart, Sr. to represent the defendant. This was done while the Court was in session in another County. Later, at a hearing, Mr. Stewart was relieved because of health reasons and it was then determined that there was no finding of indigency by the Court; defendant had divested himself of substantial property by giving a house and lot to his children, after the occurrence in question.

The defendant stated that he was satisfied with the representation of Mr. Holmes, desired for Mrs. Holmes to assist in the defense, and agreed to apply the $1,500 he had available in savings for his defense, and to also apply $37.50 of his V.A. pension monthly check to attorneys fees.

The Court has assured counsel that at the end of the proceedings consideration will be given to the amount of money paid by the defendant and whether and how much the attorneys fees should be supplemented by funds from the County.

IN THE SUPERIOR COURT FOR THE
COUNTY OF POLK, STATE OF GEORGIA

THE STATE OF GEORGIA

vs.

ROBERT FRANKLIN GODFREY

DEFENDANT'S COUNSELS' COMMENTS CONCERNING THE REPORT OF THE TRIAL JUDGE

Counsel would make the following comments revelant to the enumerated parts of the Trial Judge's Report:

A. Number 12(b)—Thjere was substantial testimony on behalf of the Defendant that he was unable to adhere to the right. See testimony of Dr. William S. Davis.

B. (b)—There was substantial psychiatric testimony by Dr. William S. Davis and by the Defendant that the murders were committed while the Defendant was under the influence of extreme mental or emotional disturbance.

D. 2(a)—Counsel would take the position that he was never retained by the Defendant. He expressed to the Court that if he had a choice, he would not represent the Defendant; however, the Court held him to the appointment and required the Defendant to pay over $1500.00 pension money that he had built up in his State job. Counsel will point out that this would never have constituted an appropriate retainer for him to take such a case as this voluntarily.

D. 3—Counsel for the Defendant would refer the Honorable Court to his Brief concerning the manner of appointment of counsel, however, counsel would point out that on two occasions prior to trial and as recently as November 7, 1978, the Trial Court has refused to declare this Appellant indigent. The transcript of the hearings on November 7, 1978, concerning indigency on appeal of the Appellant and to amend the record on appeal are being filed with the Court for its consideration just prior to argument of these cases.

This the 15th day of November, 1978.

J. CALLOWAY HOLMES, JR.,
Appointed Counsel for
the APPELLANT, ROBERT FRANKLIN GODFREY

IN THE SUPREME COURT OF GEORGIA
CASE NO. 34256

THE STATE OF GEORGIA

vs.

ROBERT FRANKLIN GODFREY

ENUMERATION OF ERRORS

Comes now the Appellant, ROBERT FRANKLIN GODFREY, and files this Enumeration of Errors.

(1) The verdict is contrary to the weight of the evidence.

(2) The verdict is not supported by substantial evidence.

(3) As a matter of law there was reasonable doubt as to the Appellant's guilt, or as to the Appellant's sanity at the time of the offense.

(4) The Court erred in charging the jury and in refusing to charge the jury, as requested by the Appellant.

(5) The Court erred in allowing into evidence highly inflammatory photographs which served no purpose and could only be considered cumulative evidence when the verbal testimony of the various witnesses is considered. The Appellant submits that this caused him to be improperly and unlawfully prejudiced.

(6) The verdict and the entire proceedings upon trial in the above styled cases are null and void because the Grand Jury which indicted said Appellant was unconstitutionally composed, and on that basis, Appellant would move as part of this Motion for the verdict to be set aside and so declared null and void.

(7) The Court erred in dismissing the Appellant's motion styled Plea and Abatement, Motion to Challenge the Array of Grand Jurors, Motion to Quash Indictments Returned and Motion to Dismiss. This caused Appellant to be deprived of a substantial Constitutional right which deprived this Appellant of due process of law, equal protection of the laws and deprived this Appellant of the privileges and immunities guaranteed to others under the Constitution of the United States.

(8) The Court erred in failing and refusing Appellant's request to charge the Law of Manslaughter. This deprived

the Appellant of the due process of law, the equal protection of the laws, and deprived the Appellant of the privileges and immunities guaranteed to all citizens under the United States Constitution and the Constitution of the State of Georgia. Attached hereto as "Exhibit A" is a newspaper article referred to a case in the State of New York where in that state the Court charged the Law of Manslaughter when the provocation consisted entirely of a severe emotional stress as the record established existed in the case at bar.

(9) The Court erred in failing and refusing to grant a Mistrial, sua sponti, on its own motion during final argument when a relative of the decreased victims began to shriek and scream in the audience and then passed out causing a great distraction amongt the jurors and the others in the audience and which created an atmosphere in which it was unlikely that the jurors went to the jury room in a cool, dispassionate frame of mind such as jurors are required under the law to exercise. The Appellant submits that this deprived him of a fair and impartial jury and thus a fair trial and due process of law.

(10) The Court erred in failing to declare a Mistrial on its own motion and allowing the prosecutor to make highly inflammatory and prejudicial statements and gestures in final argument, one of which, that of pointing a shotgun into the crowd at the woman who shrieked and fainted referred to in the previous enumeration of error, and other statements calculated only to inflame the minds of the jurors so as to predispose them against a cool and dispassionate frame of mind all of which violated the right to a fair trial and the due process of law to which the Appellant was entitled.

(1) The court erred in failing to grant a Mistrial upon application of defense counsel upon a showing through one of the Court Baliffs that the jurors were discussing the case and commenting upon the evidence contrary to the Court's instructions to them, therefore depriving the Appellant, prior to the conclusion of the evidence, of the unbiased consideration of the jurors which deprived the Appellant of the due process of law, and a fair trial as guaranteed to him under the Constitutions of the United States and Georgia.

(12) The Court erred in pronouncing a sentence of death upon the Appellant when such verdict was imposed under the influence of passion and prejudice as indicated in the previous two enumerations of error.

(13) The Court erred in its instructions on the sentencing phase of the trial in that the instructions failed to make clear to the jury that they could recommend a life sentence even if they found evidence of a statutory aggravating circumstance, and failed to inform the jury that they were authorized to consider mitigating circumstances in contravention of the requirements laid down in Georgia Code Annotated Sections 27-2534.1 (B) and (C). This deprived the Appellant of the due process of law, the equal protection of the laws, a fair trial and the privileges and immunities guaranteed to all citizens under the Constitutions of the United States and of Georgia.

(14) The Court erred in overruling the Appellant's Motion in Limine to Exclude Specified Evidence, i.e., photographs and also erred in allowing into evidence over the Appellant's numerous objections the photographs which were merely cummulative evidence since explicit and detailed verbal testimony from the medical examiner and the police officers had previously been allowed before the jury and since color photographs were chosen when the State also had black and white photographs of the same views; it indicates that the State's intentions were merely to inflame the minds of the jurors against the Appellant and this prejudiced the Appellant improperly and deprived him of a fair trial and due process of law.

(15) The Court erred in overruling the Appellant's Motion for a Continuance which denied the Appellant the substantial right to a fair and impartial trial, due process of law and of well-prepared counsel guaranteed under the Sixth Amendment to the Constitution of the United States.

(16) The Court erred in denying the Apellant's Motion to Sever which substantially prejudiced the Appellant and denied him due process of law.

(17) The Court erred in overruling the Appellant's Motion for a Change of Venue which substantially prejudiced the rights of the Appellant under the Constitutions of the United States and of Georgia and particularly deprived the Appellant of a fair and impartial jury and of due process of law.

(18) The Court erred in overruling the Appellant's Motion to Compel Depositions or in the alternative to order a preliminary hearing for the Appellant and said denial deprived the Appellant of due process of the law and the equal protection of the laws guaranteed under the Constitutions of the United States and Georgia.

(19) The Court erred in overruling the Appellant's Motion to Dismiss the Indictment which challenged the constitutionality of the death penalty and the procedure for its imposition under the appropriate Code Sections in Georgia. And more particularly the Appellant alleges that Georgia Code Annotated Section 27-2534.1(B)(7), the aggravating circumstances found by the jury, that is the offense was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victims is unconstitutionally vague and subject to various and unpredictable interpretations depending on the nature and beliefs of particular jurors and therefore violates as well the equal protection clause of the Constitution of the United States.

(20) The evidence did not support the finding of the statutory aggravating circumstance.

(21) The Court erred in overruling the Appellant's Motion to Quash the Indictment filed on March 3rd, 1978 prior to entry of plea of not guilty which Motion alleged that the Indictment was defective in that it charged separate and distinct offenses within a single count contrary to Georgia law.

(22) The Court erred in failing to chargae the Appellant's Request to Charge Number 7 in that it is an accurate statement of the law in Georgia and was not adequately covered in the Court's given charge.

(23) The Court erred in failing to charge the Appellant's Request to Charge Number 8 which was warranted in this case, since a valid law and was not covered adequately in the Court's charge.

(24) The Court erred in failing to charge the Appellant's Request to Charge Number 10 in that said charge sets out valid Georgia case law which has been neither reversed nor overruled and which was not adequately covered in the Court's given charge, and which refusal improperly prejudiced the Appellant.

(25) The Court erred in failing and refusing to give the Appellant's Request to Charge Number 11 which charge sets out valid Georgia case law and which was not adequately covered in the Court's given charge which improperly prejudiced this Appellant.

(26) The Court erred in refusing and failing to charge the Appellant's Request to Charge Number 14 which is a valid statement of law and which was not adequately covered in the Court's given charge.

(27) The Court erred in failing and refusing to give the Appellant's Request to Charge Number 16 concerning the definition of reasonable doubt since the definition given by the Court in its charge tends to favor the State and diminishes the idea of a reasonable doubt, therefore, Appellant submits that his charge should have been given as a counterweight to the Court's given charge, and submits that he was improperly prejudiced thereby.

(28) The Court erred in failing and refusing to charge the Appellant's Request to Charge Number 19 in that it set out a valid statement of the law of Georgia and was not adequately covered in the Court's given charge and therefore improperly prejudiced the Appellant.

(29) The Court erred in failing and refusing to charge the Appellant's Request to Charge Number 21 which should have been charged because manslaughter should have been charged under the facts of this case and the Appellant was greatly prejudiced by the removal of this option from the jury and further, this charge is a valid statement of the law in Georgia.

(30) The Court erred in failing and refusing to charge the Appellant's Request to Charge Number 23 in that it constitutes a valid statement of the law and was not adequately covered in the Court's given charge which was improperly prejudicial to the Appellant.

(31) The Court erred in failing and refusing to give the Appellant's Request to Charge Number 28 which requested that the Court charge the jury Georgia Code Annotated Section 27-1503 (A) and (B). This charge would have explained to the jury that the Appellant, even though acquitted as insane, could be confined almost indefinitely by petition to the Court by the District Attorney or other governmental authority, and deprived defense counsel of the opportunity to argue such to the jury, thereby, leaving the jury with the impression that it had to either convict the Appellant or see the Appellant walk out of the courtroom onto the streets, all of which improperly prejudiced the Appellant and tended to dispose the jurors toward resolving any doubt in their mind against the Appellant, contrary to law.

(32) The Court erred in allowing the District Attorney to read, at the beginning of his argument, before the jury portions of a case which though clearly distinguishable upon the facts, did, or could easily have, cause the jury to believe that the Supreme Court of Georgia had directed

that cases similar to the case at bar were deserving of guilty verdicts; and the Appellant further alleges that the whole procedure whereby the District Attorney is allowed to read from case law to the Court in the presence of the jury is a violation of due process in that it infringes upon the Court's function to give the law to the jury and is confusing to the jury all to the improper prejudice of the Appellant, which denies the Appellant his right to a fair trial before an impartial jury.

(33) The Court erred in allowing the District Attorney to make remarks in his argument to the jury at the sentencing stage which included quotations concerning the death penalty from an old Georgia case in violation of the Georgia Code Annotated Section 24-3349 and which Appellant submits caused the sentence of death to be imposed under the influence of passion and prejudice.

STEWART AND HOLMES

By S/ _____
J. CALLOWAY HOLMES, JR.

P.O. Box 63
Cedartown, Georgia 30125

By S/ _____
GERRY E. HOLMES

P.O. Box 930
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STATEMENT OF JURISDICTION

The Supreme Court of Georgia, rather than the Court of Appeals, has jurisdiction of this case on appeal for the reason that the Defendant, Robert Franklin Godfrey, was convicted for a capital felony and the death sentence imposed. Georgia Code Annotated §2-3704.

IN THE SUPREME COURT OF GEORGIA

NO. 34256

ROBERT FRANKLIN GODFREY, APPELIANT

v

THE STATE, APPELLEE

OPINION—February 27, 1979

HALL, Justice.

Appellant, Robert Franklin Godfrey, was tried in Polk County for the murder of his wife and mother-in-law and for aggravated assault on his eleven-year-old daughter. Following his conviction by a jury, he was sentenced to death for each of the murders and to 10 years imprisonment for the aggravated assault. He appeals to this court on enumerated errors and for mandatory review of the death sentences imposed.

I. Summary of the Evidence

There was evidence presented in court from which the jury was authorized to find the following:

On September 5, 1977, appellant's wife left him after he cut some of her clothes off her body with a knife. She moved in with her mother, refused to move back home, and filed for divorce. She also charged him with aggravated assault.

On the morning of September 20, 1977, Appellant, who was employed as a male nurse, told a female nurse that he was getting a divorce and it would all be over on the twenty-first. (The divorce hearing was set for the twenty-second.) On the same day, Appellant's mother-in-law called him at work and told him that Mrs. Godfrey would telephone him that evening. She did call, but would not agree to halt the divorce proceedings for an attempted reconciliation. Mrs. Godfrey called back later and again refused to attempt reconciliation.

Appellant took his single action rifle-shotgun and walked to the mother-in-law's trailer home, in which Mrs. Godfrey, her daughter andd her mother were playing a game around a table. Appellant killed his wife by shooting her in the head, firing through a window. He struck his

eleven-year-old daughter on the head with the barrel of the gun as she ran for help. Appellant then shot his mother-in-law, killing her. He then called the Polk County Sheriff's office, identified himself, reported the crimes and gave directions to the trailer. He waited at the scene until a policeman arrived. Appellant told the policeman "they're dead. I killed them," and directed the policeman to the murder weapon which was resting in the branches of an apple tree.

After being arrested and advised of his rights, appellant was taken to the police station where he told a police officer that he had committed a "hideous crime" which he had thought about for eight years and would do again.

The theory of the defense at trial was insanity. The defense psychiatrist described Appellant's behavior during the murders as a "dissociative attack," but did not testify that this was a psychosis of any kind. Appellant denied remembering anything from the time of his second telephone conversation with Mrs. Godfrey until he "woke up" in jail the following day. The defense psychiatrist testified that Appellant could not remember the crimes even after receiving an injection of sodium amytal, a "truth serum," although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

The state presented testimony from experts and other witnesses that Appellant was sane and could distinguish right from wrong.

II. Enumerations of Error

1. Enumerations of error 1,2 and 3 incorporate what are generally referred to as the general grounds.

On appeal this court does not review the weight of the evidence but examines its sufficiency. *Peek v. State*, 239 Ga. 422 (238 SE2d 12) (1977). If there is any evidence to support it the verdict will not be disturbed on appeal. *Drake v. State*, 241 Ga. 583, 585 (247 SE2d 57) (1978); *Campbell v. State*, 240 Ga. 352, 354 (240 SE2d 828) (1977). There was abundant evidence admitted at trial to support these verdicts.

Appellant's contention that the evidence as to his sanity raised a reasonable doubt as to his guilt is without merit; there was absolutely no evidence, even from the defense psychiatrist, that Appellant had been at any time psychotic or "insane." See *Spivey v. State*, 241 Ga. 477, 478

(246 SE2d 288) (1978). These enumerations are without merit.

2. Enumerations 5 and 14 urge that the trial court erred in admitting over objection certain photographs taken at the scene of the crime depicting the victims' wounds and the surrounding area. Portions of the heads of both victims were literally blown away, and when officers arrived blood was dripping from the ceiling of the trailer.

We have repeatedly held that photographs of this sort are generally admissible. E.g., *Steven v. State*, 242 Ga. 34, 38 (247 SE2d 838) (1978); *Burger v. State*, 242 Ga. 28, 31 (247 SE2d 834) (1978); *White v. State*, 242 Ga. 21, 22 (247 SE2d 759) (1978); *Lamb v. State*, 241 Ga. 10, 13 (243 SE2d 59) (1978); *Moore v. State*, 240 Ga. 807, 816 (243 SE2d 1) (1978); *Davis v. State*, 240 Ga. 763, 766–767 (243 SE2d 12) (1978).

Appellant cites in support of his objection the following sentence from *Holcomb v. State*, 130 Ga. App. 154, 155 (202 SE2d 529) (1973): "Where, as here, the cause of death is not in dispute, and the defendant admits to having fired the fatal bullet, a trial judge would often be well advised to sustain an objection to their [photographs'] admissibility on the ground that they add nothing of probative value to the record." This sentence is dicta; it does not correctly state the law of Georgia; it has proved confusing to trial counsel; and we have disapproved it. *Stevens*, supra, at 39. We agree with the state that a criminal defendant has no right to prevent the jury from seeing the crime scene and the victims' injuries. The trial court did not err in admitting these photographs.

3. In enumerations 6 and 7, Appellant urges that the grand jury which indicted him was unconstitutionally composed and that it was error to dismiss his motion challenging its composition.

These murders occurred on September 20, 1977; counsel was notified of his appointment to represent Appellant on September 21, 1977; and he has never been relieved of those duties notwithstanding some question he raised concerning Appellant's ability to pay him. Appellant was indicted by the grand jury on December 15, 1978. Thus, Appellant was represented by counsel long before indictment, but no objection to the composition of the grand jury was raised prior to indictment.

The general rule in Georgia is that for a challenge to the array of grand jurors "to be entertained by the trial court,

it must be made prior to the return of the indictment or the defendant must show that he had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned; otherwise, the objection is deemed to be waived. *Estes v. State*, 232 Ga. 703, 708 (208 SE2d 806) (1974)." *Sanders v. State*, 235 Ga. 425, 426 (219 SE2d 768) (1975) cert den., 425 U.S. 976 (96 SC 2177, 48 LE2d 800) (1976).

There was no showing that Appellant did not have reason to believe that an indictment would be returned against him, having had counsel appointed three months before indictment and having admittedly killed two persons. *Holsey v. State*, 235 Ga. 270 (219 SE2d 374) (1975); *Wooten v. State*, 224 Ga. 106 (160 SE2d 403) (1968). There is no contention that the alleged illegality of the grand jury composition was unknown prior to indictment.

To avoid being held to have waived the objection, Appellant argues that the indictment was rendered by a specially summoned grand jury, and he did not expect it until several weeks later. This is not a ground of exemption from the waiver rule. A defendant has no right to be notified in advance of grand jury proceedings, and has no right to be there. Indeed, *Howard v. State*, 60 Ga. App. 229, 235-236 (4 SE2d 418) (1939) clearly shows that the state law contemplates that indictments shall be returned in secret, without the accused's knowing exactly when.

Appellant was correctly held to have waived his right to object to the composition of the grand jury, and enumerations 6 and 7 are without merit.

Even were we to consider the merits of this point, it would fail. The primary thrust of Appellant's attempted evidence at the motion hearing was that persons between 18 and 21 years of age were not present on the grand jury although Georgia law now authorizes them to serve. This does not show illegality of the grand jury: age is not a recognized class for purpoes of grand jury representation. *Fouts v. State*, 240 Ga. 39, 41 (239 SE2d 366) (1977); *Barrow v. State*, 239 Ga. 162 (236 SE2d 257) (1977); *State v. Gould*, 232 Ga. 844 (209 SE2d 312) (1974).

4. In enumerations 8 and 29, Appellant alleges the trial court erred in refusing to charge the law of manslaughter.

There was no evidence in this case of "sudden, violent and irresistible passion resulting from serious provocation to warrant charging on voluntary manslaughter under Code Ann. §26-1102.

5. In enumerations 9 and 10, Appellant alleges the trial court erred twice in failing to grant a mistrial, sua sponte. Enumeration 9 complains of the prosecutor's final argument during which a relative of the deceased victims fainted in the courtroom. Enumeration 10 objects to that part of the prosecutor's argument which ridiculed the testimony of the defense psychiatrist. No mistrial motion was made on either ground.

Our review of the supplemental record, containing a transcript of a hearing on these points, shows that the trial court did not err as charged, as no ground for mistrial appears.

Accordingly, enumerations 9 and 10 are without merit.

6. In enumeration 11, Appellant alleges that the trial court erred in failing to grant a mistrial upon application of defense counsel showing through one of the bailiffs that the jurors were discussing the case and commenting upon the evidence prior to the start of their deliberations. A bailiff testified that "Well, I heard someone say something about the defendant showing no emotion when he saw those pictures [of the victims]." There was no further evidence.

From the question asked, the bailiff was undoubtedly referring to a juror's comment on the demeanor of the defendant. There is no indication of pre-judgment of evidence in violation of the instructions of the trial court. Nor does it appear that there was an unauthorized communication to a bailiff. Under these circumstances the trial court did not err in denying the Appellant's motion for a mistrial. See, *Battle v. State*, 234 Ga. 637 (217 SE2d 255) (1975).

7. In enumeration 15, Appellant complains of the overruling of his motion for a continuance. A continuance was sought to allow further time to prepare for trial and to allow community sentiment aroused by the crime to cool.

The granting of a continuance rests in the sound discretion of the trial judge. Code Ann. §§27-2202, 81-1419. Counsel were notified of their appointment on September 21, 1977 and the motion for continuance was filed February 1, 1978, and heard February 9, 1978. Under these circumstances, and in light of our disposition of enumeration 17 below, we cannot say the trial court abused its discretion *Campbell v. State*, 240 Ga. 352, 356 (240 SE2d 828) (1977); *Pulliam v. State*, 236 Ga. 460, 461-462 (224 SE2d 8) (1976).

8. In enumerations 16 and 21, Appellant alleges the trial court erred in denying his motion to sever the two murder charges. He urges that the joint trial of two "gruesome killings is inherently prejudicial." This contention is totally without merit. Code Ann. §26-506(b) and (c); *Stewart v. State*, 239 Ga. 588, 589 (238 SE2d 540) (1977); *Jarrell v. State*, 234 Ga. 410, 413 (216 SE2d 258) (1975); *Henderson v. State*, 227 Ga. 68 (179 SE2d 76) (1970). Neither were counts 1 and 2 objectionable because each was sufficient to charge both felony murder and malice murder.

Enumerations 16 and 21 are without merit.

9. In enumeration 17, Appellant urges that the court erred in overruling his motion for a change of venue, which was made on the theory that pre-trial publicity made it impossible for him to obtain an unbiased jury. "The test as to whether pre-trial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the accused from the pre-trial publicity. *Krist v. Caldwell*, 230 Ga. 536, 537 (198 SE2d 161) (1973)." *Wilkes v. State*, 238 Ga. 57, 58-59 (230 SE2d 867) (1976). Accord, *Burnett v. Smith*, 240 Ga. 681, 684 (242 SE2d 79) (1978). See Code Ann. §§27-1101, 27-1201.

After studying the voir dire examination in this case we conclude that it does not show that the jurors selected to try Appellant's case had formed fixed opinions as to guilt or innocence from publicity in the community.

Enumeration 17 is therefore without merit.

10. Appellant alleges in enumeration 18 that the trial court erred in overruling his motion to compel depositions of witnesses, or in the alternative to order a preliminary hearing.

Appellant correctly concedes that there is no statutory provision for depositions or discovery in criminal cases in this state. *Brown v. State*, 238 Ga. 98 (231 SE2d 65) (1976). After indictment and subsequent conviction the lack of a commitment hearing will not be construed as reversible error. *State v. Middlebrooks*, 236 Ga. 52 (222 SE2d 343) (1976) and cases cited therein. Moreover, the defense attorney was repeatedly given access to the entire state file, and nothing prevented him from interviewing witnesses. This enumeration is without merit.

11. In enumeration 19, Appellant makes a general attack on the constitutionality of the Georgia death penalty

statute and specifically attacks the statutory aggravating circumstance described in Code Ann. §27-2534.1 (b) (7) ("The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim") as unconstitutionally vague.

The Georgia death penalty statute (Ga. L. 1973, p. 159 et seq. (Code Ann. §27-2534.1)) has been upheld by this court and by the Supreme Court of the United States. *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); Gregg v. Georgia, 428 U.S. 153 (96 SC 2909) (1976). We have previously considered the vagueness issue raised by Appellant, and have upheld Code Ann. §27-2534.1 (b) (7) in *Harris v. State*, 237 Ga. 718, 731-733 (230 SE2d 1) (1976) and *Lamb v. State*, 241 Ga. 10, 14-15 (243 SE2d 59) (1978). The statute is not unconstitutional for any reason alleged.

12. In enumerations 4, 22, 23, 24, 25, 26, 27, 28, 30, and 31, Appellant challenges instructions given by the trial court, or contends that the court erred in refusing to give requested instructions.

We have examined each enumeration and find that the court covered the matter correctly in his instructions, or that the requested charge does not correctly reflect the law, or that the giving of the requested charge would have been inappropriate.

13. In enumeration 32 Appellant states that the trial court erred in allowing the district attorney in his argument to read before the jury from decided cases.

Code Ann. §24-3319 provides in part that "Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals."

The argument challenged was directed to the trial judge on matters of law. Although the jury was present, reading and arguing law to the court is not reversible error. *Potts v. State*, 241 Ga. 67, 75 (243 SE2d 510) (1978).

Appellant's other enumerations concern matters that will be considered in our sentence review.

III. Sentence Review

In our sentence review we have considered the evidence concerning the crimes of murder and the aggravating circumstances found by the jury and the matters presented by Appellant.

We have reviewed the death sentence as required by Ga. L. 1973, p. 159 et seq. (Code Ann. §27-2537 (c)), as was done in *Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1974), and each subsequent case involving the death penalty under this statute.

With regard to the sentence our first consideration is:

"Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" Code Ann. §27-2537(c) (1).

Appellant alleges in enumeration 12 that the forceful argument of counsel which he alleges caused a spectator to faint (enumeration 10) and the comment by a juror concerning the demeanor of Appellant (enumeration 11) resulted in the sentence of death being imposed under the influence of passion and prejudice. We do not so find.

He also alleges in enumeration 33 that the District Attorney's argument to the jury at the sentencing stage which included quotations concerning the death penalty from an old Georgia case, caused the sentence of death to be imposed under the influence of passion and prejudice.

Our study of that portion of the District Attorney's argument shows that the judge referred to, the case, and the outcome, were all unidentified. The quotation was of minimal significance, and enumeration 33 contains no merit. *Ruffin v. State*, 243 Ga. 95 (1979) and cits.

We conclude that the sentences of death imposed here were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our second consideration is:

"Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1 (b)." Code Ann. §27-2537(c) (2).

The statutory aggravating circumstance found by the jury as to each murder was "the offense of murder was outrageously or wantonly vile, horrible and inhuman." Code Ann. §27-2534.,1(b) (7).

The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable. See *Ruffin v. State*, supra.

Although Appellant alleges "The Court erred in its instructions on the sentencing phase of the trial in that the instructions failed to make clear to the jury that they could recommend a life sentence even if they found evi-

dence of a statutory aggravating circumstance, and failed to inform the jury that they were authorized to consider mitigating circumstances" we find that the court defined mitigating circumstances and charged "In determining your verdict in this case you shall consider any mitigating circumstances which you find," as well as charging "even though you find the existence of a statutory aggravating circumstance or circumstances you could recommend a life sentence."

The charge of the trial court complies with the requirements laid down in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977); *Hawes v. State*, 240 Ga. 327, 334 (240 SE2d 833) (1977) and *Spivey v. State*, 241 Ga. 477, 479 (246 SE2d 288) (1978).

The verdict is factually substantiated.

Our final consideration is: "Whether the sentence of death is excessive or disporportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code Ann. §27-2537 (c) (3).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed and we find the similar cases listed in the Appendix support the affirmance of the death penalty in this case. Robert Franklin Godfrey's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Jordan, J., who dissents as to Division 2, and Hill, J., who dissents.

ARGUED NOVEMBER 20, 1978—
DECIDED FEBRUARY 27, 1979—
REHEARING DENIED MARCH 27, 1979.

Murder, etc. Polk Superior Court. Before Judg Winn.

J. Calloway Holmes, Jr., Gerry E. Holmes, for appellant.

John T. Perrin, District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Assistant Attorney General, for appellee.

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975); Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976); Isaacs v. State, 237 Ga. 105 (226 SE2d 922) (1976); Dungee v. State, 237 Ga. 218 (227 SE2d 746) (1976); Banks v. State, 237 Ga. 325 (227 SE2d 380) (1976); Young v. State, 239 Ga. 53 (236 SE2d 1) (1977); Gaddis v. State, 239 Ga. 238 (236 SE2d 594) (1977); Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978); Finney v. State, 242 Ga. 582 (SE2d) (1978).

Supreme Court of the United States

No. 78-6899

ROBERT FRANKLIN GODFREY, PETITIONER

v.

GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question presented by the Court: In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Georgia Code Ann. §27-2534.1(b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

OCTOBER 9, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6899

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v.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Is the Supreme Court of Georgia's appellate review of Petitioner's death sentence in conformity with its statutory obligation under Georgia law?

2.

May Petitioner challenge the composition of the grand jury that indicted him after he has failed to comply with state law regarding the timeliness of such challenges?

3.

Was it error to fail to charge on a lesser degree of murder where the evidence did not support such an instruction?

4.

Did the placing into evidence of photographs of the murder scene amount to a violation of Petitioner's right to a fair trial?

5.

Were the trial court's instructions during the penalty phase of Petitioner's trial sufficient to give the jurors sufficient guidance in terms of what constitutes a mitigating circumstance?

6.

Is the failure of a trial judge to charge exactly as requested of constitutional significance when the court's charge adequately embodied what Petitioner sought to have charged?

7.

Is the reading of an excerpt from an appellate decision to the trial judge in the presence of the jury a Due Process violation?

8.

Do matters presented in a petition for certiorari for the first time provide a basis for review?

STATEMENT OF THE CASE

Robert Franklin Godfrey, hereinafter referred to as the Petitioner, was indicted by a Polk County, Georgia grand jury for the September 20, 1977, murders of Mrs. Chessie C. Wilkerson [Petitioner's mother-in-law] and Mrs. Mildred Godfrey [Petitioner's estranged wife], and for an aggravated assault of Tracey Godfrey [Petitioner's daughter]. Following a jury trial, Petitioner was found guilty on all three counts. Petitioner received the death penalty for each of the two murder convictions and ten years for aggravated assault. Petitioner's convictions were later affirmed on appeal by the Supreme Court of Georgia. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1978).

STATEMENT OF FACTS

Approximately two weeks before the murders, Petitioner on September 5, 1977, was seen threatening his wife, Mildred Godfrey, with a pocketknife. Petitioner and his wife had been arguing; and Petitioner had locked himself and his wife in the bathroom. The Godfrey's eleven-year-old daughter, Tracey, had gone to the nearby home of her married sister, Cathy Venable, for help. Mrs. Venable, along with Petitioner's brother, Billy Godfrey, Petitioner's nephew, Dennis Newby, entered Petitioner's home about the same time. Petitioner had obviously been drinking. Mrs. Godfrey told Petitioner she wanted to leave him. Petitioner then pulled out a pocketknife and told his wife he would cut her if she left him.

Mrs. Godfrey and Tracey moved out following the incident on September 5, and eventually moved into the trailer of Mrs. Godfrey's mother, Chessie Wilkerson, which was located several yards down the road. On September 6, Mrs. Godfrey showed her older daughter, Cathy, a pair of torn slacks and

underpants which Petitioner had cut off her the previous day. Mrs. Venable testified that following this separation, Petitioner had told her that he would accept a divorce.

Charles E. Hunt, a Justice of the Peace, stated that on September 5, he issued a warrant to Mildred Godfrey on Petitioner for aggravaged assault.[1/]

Elizabeth Newton, a nurse at Northwest Regional Hospital where Petitioner was employed as a male nurse, testified that on the morning of September 20, Petitioner told her he was getting a divorce. Petitioner said that it would all be over on the twenty-first.

On the evening of September 20, Tracey Godfrey was playing Rook with her mother and grandmother in Mrs. Wilkerson's trailer. Tracey heard a gunshot and saw her mother's head droop down. The grandmother screamed and told Tracey to get help. Tracey ran out the door, but Petitioner hit her in the head with the barrel of his gun. Tracey heard two more shots as she ran to Cathy Venable's home.

Tracey told Cathy Venable, and Dennis Newby's wife, Jackie, that Petitioner had shot her mother and hit her with a gun. Tracey had a laceration on the top of her head which was treated later at a hospital. Following the shooting, Petitioner sat outside in a yard chair near the trailer.

The county jail jailer, Carl Rice, received a call that evening from Petitioner. Petitioner told Rice that he had blown his wife's and mother-in-law's heads off and

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1/ Ga. Laws 1968, pp. 1249, 1280, as amended, Ga. Laws 1976, p. 543; Ga. Code Ann. § 26-1302.

asked to have the sheriff come for him.

Polk County policeman, Seals Minshew, arrived at the trailer about 8:35 p.m. Petitioner, who was sitting in a chair under a tree, told Minshew that there was no need to go to the trailer because "they're dead, I killed them." Minshew testified that Petitioner then offered to show him the weapon and directed him to the branches of an apple tree where the gun was resting. Minshew recovered a rifle-shotgun with an empty chamber. Petitioner was then arrested and advised of his rights.

Petitioner after being placed in a patrol car told Sheriff Seals Swafford that everything was taken care of, and that it was all over. At the police station, Petitioner told Patrolman James McLendon, Jr., that he had committed "a hideous crime" and that he had thought about it for eight years and would do it again.

One spent shell was found under the kitchen table in the trailer; one spent 20 guage shell was found in the trailer's carport; three live shells were found by the fence outside. Mildred Godfrey was found lying on her back with a hole in her forehead the size of a silver dollar. A hole was in the screen of a window facing the kitchen area. A spray of shots was scattered throughout the kitchen, and blood was dripping from the ceiling.

Mrs. Wilkerson was lying face down; the top part of her head was missing. Less than two feet from her head were parts of her skull and her brain. A few feet further away were more skull portions.

Jackie Newby, Elizabeth Newton, Carl Rice, and Officer Minshew testified that they believed Petitioner was sane and could distinguish right from wrong.

Dr. Robert A. Farrell performed external examinations of the two victims. Mildred Godfrey had a wound 3 1/2 to 4 inches wide in her forehead. Mrs. Wilkerson showed loss of a considerable amount of bone and soft tissue, skin and hair above and behind the right ear. Both women died from a gunshot wound to the head with resulting brain damage.

The defense offered the testimony of a psychiatrist, Petitioner, and two employees of the hospital where Petitioner was employed. Mrs. Dean Lebkicher, Director of Nursing at Northwest Regional Hospital, and Dr. Joseph Liang, Chief of Surgery at the same hospital, testified that Petitioner was a good worker and was dependable in his job.

Dr. William S. Davis, a psychiatrist, who had formerly treated Petitioner for alcohol abuse and depression testified for Petitioner. Dr. Davis examined Petitioner in February, 1978, under a court order. According to Dr. Davis, Petitioner was so upset on September 20, after his wife refused to consider any reconciliation with him, that he suffered a dissociative attack, causing him to forget all events relating to the shootings. Dr. Davis explained that Petitioner might have known right from wrong while in this state, but was unable to control his actions to prevent doing wrong. Dr. Davis said that Petitioner did not recall the events after being injected with Amytal.

Petitioner testified in his own behalf, recounting that his wife had him committed in 1950, 1966 and 1971 for drinking problems. Petitioner admitted that he had argued with his wife on September 5, but he claimed he could not recall threatening her with a knife. Petitioner testified that he had asked his wife three times during their separation when she would be coming back home, but she refused to consider it.

Petitioner's version of the events of September 20, 1977, was that on that date his mother-in-law called him to tell him his wife would call later. Mildred Godfrey later called Petitioner and told him she wanted all the proceeds from the sale of their house. Petitioner disagreed with this request, and his wife said she would call later. When Mrs. Godfrey later called, they argued again, and Petitioner's wife told him that the divorce would come up in court on the 22nd and that things would be settled then. According to Petitioner, he remembered hanging up the phone and his next recollection was waking up in the county jail on September 21. On cross-examination, Petitioner claimed he had never hit his wife with his fists, although he admitted he had slapped her.

The State called two witnesses in rebuttal. Dr. Robert Wildman, a clinical psychologist and Dr. Carl Smith, a psychiatrist both from Central State Hospital, Milledgeville, Georgia.[2/] Both men had examined and evaluated Petitioner under court order in February, 1978. Petitioner, it should be noted, had no history of psychosis or insanity, had no organic brain damage and exhibited no abnormal behavior. Dr. Wildman testified that one test revealed that either Petitioner was being uncooperative in the testing procedure or was trying to appear more disturbed than he was. Dr. Smith stated that a person will not necessarily tell the truth after injected with Amytal. Both Dr. Wildman and

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2/ Central State Hospital is the State hospital in Georgia where most individuals accused of a crime are sent for a psychiatric evaluation after they have filed a motion for psychiatric examination.

Dr. Smith testified that they believed that Petitioner had been able to distinguish right from wrong on September 20.

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA HAS NOT ABANDONED ITS APPELLATE REVIEW PROCESS WHICH THIS COURT EARLIER APPROVED, NOR HAS THE SUPREME COURT OF GEORGIA PERMITTED ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UPON WHICH THE PETITIONER WAS SENTENCED TO DEATH TO BECOME A "CATCHALL."

For the first time the Petitioner contends that the statutory aggravating circumstance upon which the trial jurors imposed the death penalty is void because there was only a partial finding of this statutory aggravating circumstance. Since matters raised for the first time on a petition for a writ of certiorari may not be providently reviewed, Stembridge v. Georgia, 343 U.S. 541 (1952), this aspect of this contention should be denied.

The Petitioner states that the seventh aggravating circumstance, namely the offense of murder was outrageously and wantonly vile, horrible and inhumane in that it involved a torture and depravity of mind on the part of the defendant or an aggravated battery to the victim, is unconstitutional in that it has not been narrowly applied by the Suprem Court of Georgia, and as such is a catchall statutory aggravating circumstance.

Respondent submits that the germane issue in this matter is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence prior to any consideration being given to whether or not the Supreme Court of Georgia has not limited the application of this statutory aggravating circumstance. Based upon the statement of facts which is in the first portion of this brief, it cannot be said that under the circumstances of this case (the facts are so horrifying) that the murder was not outrageously and wantonly vile, horrible

The cases in which this statutory aggravating circumstance has been considered by the Georgia Supreme Court have been carefully reviewed and there are no cases in which the Supreme Court of Georgia has permitted this seventh statutory aggravating circumstance to become a general receptacle for upholding the death penalty. On the basis of the facts in this case the evidence was so clear and convincing that there was no necessity or a requirement that the jurors be informed as to what constituted torture or depravity of mind, since the evidence clearly established all of the requirements as contained in the seventh statutory aggravating circumstance. The facts in this case do not lead to the conclusion that the jurors were given unbridled discretion, since the facts were so wantonly vile that they almost defy description.

Lastly, the Supreme Court of Georgia has not abandoned its appellate role in considering similar cases in determining "whether the sentence to death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3).

Furthermore, the appendix of cases considered by the Supreme Court of Georgia in carrying out its appellate statutory review function clearly demonstrates that in the six years since the revised death penalty was invoked in Georgia that they are considering cases of like circumstances wherein the death penalty for a similar statutory aggravating circumstance has been imposed. The conclusory allegations made by the Petitioner simply fail to establish that the Supreme Court of Georgia is not carrying out the review function which this Court earlier reviewed in Gregg v. Georgia, 428 U.S. 153 (1976), a procedure which was created and established by the General Assembly of Georgia.

The Petitioner's contentions surrounding the appellate review process in Georgia fail to demonstrate that certiorari in regard to the Petitioner's case is warranted.

B. UNDER GEORGIA LAW A CHALLENGE TO THE COMPOSITION OF THE GRAND JURY IS WAIVED UNLESS OBJECTED TO IN A TIMELY MANNER.

Under Georgia law a challenge to the composition of the grand jury may not be entertained by the trial court unless it is made prior to the return of an indictment, or defense counsel has shown that he has discovered an alleged error in the composition of the grand jury prior to the time an indictment was returned. Tennon v. Ricketts, 574 F.2d 1243 (5th Cir. 1978). See also, Stewart v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978). Petitioner's attorneys were appointed prior to Petitioner's indictment. At the time of Petitioner's indictment he was not without the services of an attorney. Neither is there any showing that Petitioner did not have reason to believe that an indictment would be returned against him.

Accordingly, the failure to comply with the State procedural requirement precludes the challenge to the grand jury in this instance. See, Francis v. Henderson, 425 U.S. 1708 (1976); Dennis v. Hopper, 548 F.2d 589 (5th Cir. 1977); Dumont v. Estelle, 513 F.2d 793 (5th Cir. 1975), rehng. den., 532 F.2d 1375 (5th Cir. 1976).

For this reason alone the petition for certiorari should be denied.

C. WHERE THE DEFENSE IS INSANITY, AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER IS NOT REQUIRED.

Petitioner argues that he is entitled to a new trial because the trial court failed to instruct the jury on a lesser degree of murder in Georgia, that being voluntary manslaughter.[3/] It will be recalled that the testimony presented on behalf of both the State and the Petitioner did not require an instruction on voluntary manslaughter, and as such no charge was required. See, Belton v. United States, 382 F.2d 150 (9th Cir. 1967). More importantly however, the Petitioner put forth the defense of insanity which is a defense that says basically that while I did it I am not legally responsible for my act. Under those circumstances a defense on insanity is not required. See, Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976); United States ex rel. Victor v. Weage, 330 F.Supp. 802 (D.C. N.J. 1971). Neither was there any evidence to show that the Petitioner's actions under Georgia law resulted from a "serious provocation" by his wife which would have caused him at that time to have killed this individual and her mother.

Accordingly, the lack of an instruction on voluntary manslaughter is not of constitutional proportions, and for this reason the petition for writ of certiorari should be denied.

3/ Ga. Laws 1968, pp. 1249, 1276; Ga. Code Ann. § 26-1102.

D. THE INTRODUCTION INTO EVIDENCE OF CERTAIN PHOTOGRAPHS DOES NOT RISE TO CONSTITUTIONAL DIMENSIONS.

The admissibility of photographs in a murder case, particularly where those photographs may be unpleasant,rests with the sound discretion of the trial judge. See, United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976), cert. den., 429 U.S.1004 (1976). Generally speaking the admissibility of photographs does not rise to constitutional dimensions. Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968), cert. den., 393 U.S. 868 (1968). While the photographs in issue may be gruesome they are not inadmissible for that reason alone. United States v. Hoog, 504 F.2d 45 (8thCir. 1974), cert. den., 420 U.S. 961 (1975). Petitioner has failed to show that the photographs of the two people he murdered were so inflammatory or gruesome that their prejudicial effect outweighed their probative value. United States v. Hoog, supra.

The use of photographs of murder victims, regardless of how gruesome they may be, becomes extremely relevant when the state is seeking the death penalty, since they bear directly on the question as to whether the accused's acts fall within one of the statutory aggravating circumstances contained in the Georgia death penalty statute which the State may be putting forth at a later portion of the trial. In this case the photographs depicting the bodies of the two murder victims were both relevant and material, and their admission into evidence was not for the purposes of inflaming the minds and passions of the jury, nor did their introduction into evidence correspondingly cause the jury to impose the death penalty on Petitioner. These photographs were relevant to aid the jury in depicting the crime scene and in order to provide a more meaningful manner in which to apply the evidence to the case, and thus were admitted to assist the court and jury in better understandin the case. Even though Petitioner may have admitted that he injured certain people, this does not preclude their admissibility into evidence to show the actual dismemberment which may have occurred at the Petitioner's hands. United States v. Morton, 493 F.2d 30 (5th Cir. 1974).

For this reason the petition for writ of certiorari should be denied.

E. THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE OF THE TRIAL DO NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

Petitioner contends that the sentencing instructions were defective in that the Court did not spell out the fact that the jurors were to consider the particular characteristics of the accused. This Court has long stated that instructions should be viewed as a whole as they will not be judged in artificial isolation. Cupp v. Naughten, 414 U.S. 141 (1973). The Georgia statute unlike the statute in Woodson v. North Carolina, 428 U.S. 280 (1976), and in Lockett v. Ohio, 438 U.S. 586 (1978), does not suffer from the constitutional deficiencies of having a jury impose the death penalty without considering mitigating circumstances, or limiting the mitigating circumstances. To the contrary, in Georgia the trial court fully informs the jurors that they may consider any mitigating factors, the decision as to what constitutes a mitigating factor or circumstance being left to the jurors. The Supreme Court of Georgia has made it clear that the trial court does not have to spell out what constitutes a mitigating circumstance, since the jurors are free in their own discretion to make that decision. See, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1978). Sub judice, the jurors were given a full opportunity to consider mitigating circumstances which would include their consideration on any aspects of the Petitioner's character and record that they so desired.

The Petitioner also complains about the fact that the mitigating circumstances were not sufficiently defined or that examples of mitigating circumstances were not provided. As noted above, the Supreme Court of Georgia has held that it is not necessary for the trial court to specify or single out for the jurors what might be considered as a mitigating circumstance, since to do so might place a limitation on the jurors' discretion as to what they could consider as a mitigating circumstance. If the Court were to spell out what the mitigating circumstances were in a particular case, then the petitioner would come back and state that the jurors had been unnecessarily limited to those mitigating circumstances, stating that there may have been others and giving examples of those. Clearly, the better practice, and the practice in Georgia, is for the Court to inform the jurors that they may consider mitigating circumstances, and to define mitigating circumstances as being those circumstances which do not constitute justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame on the accused. The trial court's instruction on mitigation in this instance was clearly sufficient, and since the term mitigating circumstance was defined, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See, United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. den., 522 F.2d 1280 (5th Cir. 1976).

F. PETITIONER'S RIGHT TO A FAIR TRIAL WAS NOT ABRIDGED WHEN THE TRIAL COURT FAILED TO GIVE A CHARGE EXACTLY AS REQUESTED BY THE PETITIONER WHEN THE COURT'S CHARGE AS A WHOLE ADEQUATELY COVERED THE PRINCIPLES EMBODIED IN THE PETITIONER'S REQUEST TO CHARGE WHICH WAS REFUSED.

In connection with the Petitioner's defense of insanity, the Petitioner requested a charge which is set forth on page 36 of his brief in support of the application for petition of a writ of certiorari. Respondent submits that the fact that the trial court did not give this charge does not constitute a reason for the granting of a petition for a writ of certiorari, since the court's charge as a whole embodied the various principles which are contained in that request to charge, and the mere fact that the court does not charge exactly as requested is not grounds for a new trial, especially when the court's charge as a whole adequately embodies those principles. Due process has not been offended in this matter. (See, Appendix A, which is the trial court's instructions during the guilt and innocence phase of the trial).

G. A STATE EVIDENTIARY PRACTICE WHICH PERMITS COUNSEL AT THE TRIAL JUDGE'S DISCRETION TO READ LAW TO THE COURT DOES NOT DENY AN ACCUSED DUE PROCESS OR HIS RIGHT TO A FAIR TRIAL.

Petitioner alleges that his right to a fair trial was abridged when the prosecuting attorney was permitted to read an excerpt from an appellate decision to the trial judge during the guilt and innocence and sentencing phase of the trial. First, it should be noted that there was no objection to this matter. Next, the language which the district attorney used which appears in an appellate decision is minimal to say the least. The Supreme Court of Georgia in analyzing this matter examined the district attorney's closing argument on sentencing as a whole, rather than viewing it in isolation and out of context with the overall argument. In fact, the complained of quote is as follows:

> "Let the stern response go out from the jury box, that who so sheds man's blood so shall his blood be shed." (T. 575).

This contention clearly fails to raise any matter of constitutional magnitude for scrutiny by this Court.

H. MATTERS RAISED FOR THE FIRST TIME PRESENT NOTHING FOR REVIEW.

Petitioner Godfrey seeks to have his application for certiorari granted on the basis that the Georgia death penalty statutory scheme is unconstitutional because it does not provide for the jury to sentence a defendant to life without the possibility of parole. This issue, however, was never presented to the trial court, or to the Supreme Court of Georgia.

Under Georgia procedure issues raised on appeal must have first been presented to the trial court for its consideration before that same matter will be reviewed on appeal. See, Strozier v. State, 231 Ga. 140, 141, 186 S.E.2d 145 (1973); Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971).

This same principle has likewise been applied by this Court. United States v. Nobles, 422 U.S. 225 (1975); United States v. Vuitch, 402 U.S. 62 (1971); Stembridge v. Georgia, 343 U.S. 541 (1952). Due process contentions not argued in state courts are not properly presented for review by this Court. See, Moore v. Illinois, 408 U.S. 786 (1976).

For this additional reason the application for certiorari should be denied.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served true and correct copies of the Brief for Respondent in Opposition upon the Petitioner's attorney by depositing a copy of same in the United States mail, with proper address and adequate postage attached to:

Mr. J. Calloway Holmes, Jr.
Stewart and Holmes
P. O. Box 63
Cedartown, Georgia 30125

Mr. Gerry E. Holmes
Mundy & Gammage
P. O. Box 930
Cedartown, Georgia 30125

This 25th day of July, 1979.

JOHN C. WALDEN

.2N1.096

CHARGE TO THE JURY

BY - JUDGE WINN

Ladies and gentlemen of the jury, you've been trying the case of the State versus Robert Franklin Godfrey. This case was brought into this court by the returning of a special presentment by the Grand Jury of Polk County charging the accused with the offense of murder in count one, and murder in court two, aggravated assault in count three. It alleges in substance in count one that on September the 20th,1977 in this county he did unlawfully with malice aforethought and while making an assault upon the person of Mildred Godfrey with a deadly weapon, the same being a shotgun, caused the death of the said Mildred Godfrey by shooting her with said shotgun. Count two alleges in substance that on the same date in this county he did with malice aforethought and while making an assault upon the person Chessie C. Wilkerson with a deadly weapon, the same being a shotgun, caused the death of Chessie C. Wilkerson by shooting her with the said shotgun. Count three alleges in substance that on the same date in this county he did make an assault upon the person of Tracey Godfrey with intent to murder the said Tracey Godfrey and did then and there intentionally cause physical harm to Tracey Godfrey by striking her about the head with a shotgun-rifle barrel and blunt object.

N1.100

To this presentment, which I have read to you in substance, the defendant has entered his plea of not guilty and that forms the issue which you are sworn to try. The presentment and the plea will be out with you. You may and should refer to them as often as you see fit to determine the issues involved. They are not evidence and not to be considered by you as evidence.

You are the judges of the law and the facts in this case. The facts you obtain from the evidence produced before you, the law you take from the court as given you in charge by the court and any verdict that you may render in this case should be arrived at from the facts as you thus find them to be applying thereto the law as given you in charge by the court.

Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. Intention is an essential element of any crime and the burden is on the State to prove such intention beyond a reasonable doubt. While the burden is not on the defendant to disprove intention nonetheless when he introduces some competent evidence of insanity which might tend to negate evil intention in the defendant at the time of the commission of the alleged crime then the burden falls upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime and therefore had the

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requisite criminal intent.

This presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence, and of persuasion as to the sanity of the accused in criminal proceedings, but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue then the State in order to prove the criminal intent of the accused must present evidence to prove the sanity of the accused beyond a reasonable doubt.

A person will not ... strike that. The question of whether or not the defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the defendant introduce evidence of his insanity sufficient to convince you beyond all reasonable doubt but rather it is only necessary for him to introduce some competent evidence of his insanity. When he has done this the burden shifts to the State to prove his sanity beyond a reasonable doubt.

A defendant may be found to have been insane at the time of the alleged criminal act and therefore entitled to an acquittal even though he may be sane at the time of trial.

Now, a reasonable doubt means exactly what it says, it is a doubt that is founded upon reason. A reasonable doubt may grow out of the evidence or want of evidence. While the law requires the State to prove the defendant's guilt of the offense charged to your satisfaction beyond a reasonable doubt yet the law does not require the State to prove the defendant's guilt to a mathmetical or an absolute certainty. A reasonable doubt is not a vague or a conjectural doubt, it is not a fanciful doubt, it is not an imaginary doubt, neither does it mean a possibility that the defendant may be innocent, but as the court has stated to you it is a doubt that is founded upon reason.

The burden is upon the State to prove beyond a reasonable doubt the crime charged in the presentment. That burden never shifts. The defendant need not prove his innocence. If on the whole the evidence is as consistent with guilt as with innocence it is the jury's duty to acquit.

You are made by law the exclusive judges as to the credibility of the witnesses. In passing upon their credibility you may consider all the facts and circumstances of the case, the witnesses manner of testifying, their intelligence, their interest or want of interest, their means and opportunities for knowing facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their

testimony, and also their personal credibility insofar as the same may legitimately appear from the trial of the case. You may also consider the relationship or the absence of relationship of the witnesses to the parties to the case.

Testimony has been given by certain witnesses who are termed experts. While in cases such as the one being tried the law receives the evidence of persons expert in certain lines as to their opinions derived from their knowledge of particular matters. The ultimate weight which is given to the testimony of expert witnesses is a question to be determined by you. In other words the testimony of an expert like that of any other witness is to be received by you and given such weight as you think it is properly entitled to but you are not bound or concluded by the testimony of any witness expert or otherwise.

The law makes it your duty to reconcile conflicting evidence, if there be such evidence in this case, so as to make all the witnesses speak the truth and perjury be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done it would be your duty to believe that testimony which is most reasonable and most credible to you under all the circumstances and the evidence in this case.

The admission of gruesome photographs against the defendant were not intended to inflame your minds. They are not in the record for that purpose because the defendant is entitled to your cool and calm and free deliberations. You should lay aside any passion or prejudice against the defendant by reason of any exhibition that may appear on the photographs.

In respect to evidence, direct evidence points immediately or directly to the question in issue while indirect or circumstantial evidence tends to establish the issue by proof of various facts and circumstances sustaining by their consistency the hypothesis claimed. Before you would be authorized to convict on circumstantial evidence alone the proven facts must not only be consistent with the hypothesis of the guilt of the accused but must exclude every other reasonable hypothesis save that of the guilt of the accused.

In criminal cases the defendant is permitted to introduce evidence as to his or her general good character. Good character may of itself be sufficient to justify a reasonable doubt as to the guilt of the accused or considered in connection with other evidence in the case it may be sufficient to create such doubt. Nevertheless if you should believe beyond a reasonable doubt that the defendant is guilty as charged in the presentment you would be authorized to convict notwithstanding the evidence of

general good character. Good character like any other fact tending to establish innocence is a substantive fact and should be so regarded by you along with the other evidence in the case in determining whether the defendant is guilty or not guilty.

The object of all legal investigations is the discovery of the truth. Rules of evidence are framed with a view to this prominent end seeking always for pure sources and the highest evidence. A crime is a violation of a statute of this state in which there shall be a union or joint operation of acts or omission to act and intention or criminal negligence. The act of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.

The defendant has put in evidence which indicates he was insane at the time of the crime. If this creates in your mind

a reasonable doubt as to his sanity the legal presumption of sanity is rebutted and the prosecution must remove that doubt and prove the sanity of the defendant beyond a reasonable doubt.

Code Section 26-1101 defines murder. It privides in Sub Section (A), a person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the daath of another human being. Expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Sub Section (B) provides, a person also commits the crime of murder when in the commission of a felony he causes the death of another human being irrespective of malice.

A felony means a crime punishable by death or by imprisonment for life or by imprisonment for more than twelve months. Code Section 26-1302 defines aggravated assault. A person commits aggravated assault when he assaults (a) with intent to murder, to rape or to rob or (B) with a deadly weapon. So you'll understand the meaning of assault Code Section 26-1301 defines simple assault, a person commits simple assault when he either (a) attempts to commit a violent injury to the person

of another, or (b) commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

Count three of the presentment charges the defendant with aggravated assault against Tracey Godfrey;on the issue of aggravated assault you may be entitled to consider whether or not the defendant is guilty of the lesser offense of simple battery. Simple battery is defined in Georgia Code, Title 26-1304 as follows. A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another, or (b) intentionally causes physical harm to another.

Code Section 26-702 provides, a person shall not be found guilty of a crime if at the time of the act, omission or negligence constituting the crime such persor did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

In order to be punishable by law a person must have sufficient memory, intelligence, reason, and will to enable him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong and that he will deserve punishment by committing

it. In order to constitute a crime a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his reasoning and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming power of mental disease his intelligent power is for the time obliterated he is not a responsible moral agent and is not punishable for criminal acts.

Insanity may be only a temporary malady. If the accused at the time of the act with the commission of which he is presently charged did not have reason sufficient to distinguish between right and wrong with reference to that act he would not be criminally responsible and it would make no difference insofar as the law is concerned whether his condition of insanity at the time of the commission of the act was of a temporary nature or permanent in character. The test of criminal responsibility being the condition of his mind at the time of the commission of the act.

In determining the issue of sanity or insanity the jury may consider the acts and mental condition as revealed by the evidence of the accused before and after the commission of the alleged offense, if any, and the declarations, if any, of the defendant made at the time of the alleged offense, or reasonably close thereto, as proof of his mental condition at the time of

such alleged crime. Opinion testimony relative to sanity or insanity, either lay or expert, is by no means conclusive upon this issue and is peculiarly dependent upon the facts or evidence supporting such opinion or opinions. The weight to be given such opinion is solely for the determination of you the jury.

If you should find that the defendant did not have reason sufficient to distinguish between right and wrong,under the instructions which I have given you, at the time of the commission of such alleged offense that would be an end to your deliberations and you would stop at that point as your verdict would be "we the jury find the defendant not guilty by reason of insanity".

The law in this state provides that in all criminal cases wherein an accused shall contend that he was insane or mentally incompetent under the law at the time the act charged against him was committed that in the case of acquittal on such contention the jury shall specify in their verdict that the accused was acquitted because of mental irresponsibility or insanity at the time of the commission of the act.

If, however, from a consideration of the evidence you determine beyond a reasonable doubt that at the time and place

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of the occasions under investigation in this trial that the defendant was sane and thus responsible in such event you would proceed to consider the other portions of the charge that I have given you, or will give you, in this case.

After considering all of the case under the charge of the court if you have a reasonable doubt as to the guilt of the accused it is your duty to give him the benefit of that doubt and acquit him and in that event the form of your verdict would be "we the jury find the defendant not guilty". If you find the defendant not guilty by reason of insanity the form of that verdict is "we the jury find the defendant not guilty by reason of insanity". If you find the defendant guilty the form of that verdict is "we the jury find the defendant guilty". You would need to reach a verdict as to each count. The three verdict forms which I have just given you would be the possible verdicts in count one and count two, the two murder counts, that is not guilty, not guilty by reason of insanity, or guilty.

As to count three you would have four possible verdicts, not guilty, not guilty by reason of insanity, guilty, which would be guilty of aggravated assault, or guilty of the lesser included offense in that count which is guilty of simple battery. And I will have each of these verdict forms prepared, they will be typed and sent out with you. The manner in which they are

.2N1.152

typed or written out would have nothing to do with what your verdict should or should not be. That is entirely up to you. Your verdict as to each count must be unanimous, that is it must be agreed to by all twelve of you, when you have reached a verdict as to each count and your foreman or forelady has signed the indictment... signed the verdict which the twelve of you agree upon notify your bailiff who will in turn notify the court and you will be allowed to publish it in open court. You may retire to the jury room.

(The jury leaves the box)

MR. HOLMES: Your Honor, is it now appropriate if I just make some objections in the record.

THE COURT: Yes.

MR. HOLMES: I would have objections to the court's charge on several bases starting with the last request for charge which is defendant's request for charge number twenty eight which was submitted this morning requesting the court to charge Georgia Code Annotated, Section 27-1503, part (a) and (b) as amended and found in the 1977 supplement which has to do with the disposition of the prisoner...

THE COURT: ... Wait until they get in and get seated. I wish you'd wait and open these doors when I direct you to Mr. Sheriff. If you'll close them now and let me finish this case.

(The sheriff closes the doors)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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OCTOBER TERM, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in Godfrey V. The State, 243 Georgia 302 (1979), and is set out in the Appendix at P 99.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was final on March 27, 1979 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The petition for certiorari was filed on June 25, 1979 and granted on October 9, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-1101

"*Murder* (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. Section 26-3102

"*Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-2534.1

"*Mitigating and aggravating circumstances; death penalty.*

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to

the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the (statutory) aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. Section 27-2537

"*Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten

days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and suppled by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The Court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the Court. The Court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without an consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding or guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of a prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law.

The judge shall imposed the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law, provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code Section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

QUESTION PRESENTED

In affirming the imposition of the death sentence in this case, has the Supreme Court Court adopted such a broad and vague construction of Georgia Code Annotated Section 27-2534.1(b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Robert Franklin Godfrey, the defendant named above as petitioner, was indicted for the murders of his wife and mother-in-law and the aggravated assault upon his young daughter by the Polk County Grand Jury on December 15, 1977, wherein it was alleged these offenses were committed by him on September 20, 1977.

The petitioner had a previous history of confinement at the Central State Mental Hospital in Milledgevilie, Georgia. He had been at Central State in 1950, 1966, and 1970, and once at the Veteran's Administration facility in Murfreesboro, Tennessee. (Tr. 364, App. 48) These confinements were due to a drinking problem, connected with depression and violent episodes toward his wife. (Tr. 439, App. 57, 58) The petitioner endured these confinements voluntarily so that his wife would take him back, and he and his wife were always reconciled after the petitioner was confined for short periods of time, the most being two months. (Tr. 364, App. 48) The Defendant had also undergone brief treatment by a psychiatrist, Dr. William S. Davis, in the mid-sixties in Rome, Georgia, when Dr. Davis practiced there before moving to Atlanta.

The defendant had been employed for approximately 25 years, with two short breaks, at the Northwest Regional Hospital in Rome, Georgia. In the earlier years, the defendant was a surgical nurse and in recent years his duties involved post-operative care and routine duties upon the wards. He was described by the head nurse and supervisor, Mrs. Jean Lebkicher, (Tr. 293, 294, App. 27, 28) and the chief surgeon, Dr. Joseph

Liang (Tr. 299, 300, App. 29), who testified to his good reliable honest character based upon working with him for over 20 years, as believable, very good and reliable at his work, and particularly gentle with patients and especially children. The defendant had been a combat medic in World War Two and Korea. (Tr. 424) The defendant suffers from extreme hypertension and is a diabetic who can not tolerate insulin. (Tr. 368, App. 50, 51) In 1976, the petitioner ran as Chief Deputy Sheriff with the losing candidate in the Sheriff's race in Polk County.

On September 5, 1977, the defendant got into an allegedly violent argument with his wife and pulled a knife on her. (Tr. 366, App. 48, 49) His wife then left him and stayed with relatives for a short time thereafter moving in with her mother. Her mother lived in a trailer approximately 200 yards downhill from the defendant's house. The trailer was situated next to a nephew's trailer and in the backyard of a house on the main road where the defendant's married daughter lived. The defendant's house was at the end of a long driveway going in near the house and trailers and winding up through some trees onto a fill. During the separation, the defendant talked with his wife on three occasions briefly but she would not agree to move back home. (Tr. 367, App. 49, 50)

Then Mrs. Godfrey had divorce papers served upon the petitioner in which she asked the Court to award all the property and their minor daughter to her. Mr. Godfrey did not consult with a lawyer. The hearing upon the divorce was set for September 22, 1977. Throughout the separation, Mr. Godfrey was very anxious to reconcile with his wife as had always

occurred in the past. (Tr. 374, 375, App. 53)

On September 20, 1977, the petitioner went to work as usual and performed his normal duties throughout the day at the hospital in a normal manner. He was called sometime during the day by his mother-in-law and told that his wife wanted to talk with him by telephone that evening. This led the defendant to hope that their differences would be resolved. The petitioner got home around 4:00 o'clock, P.M., and fixed himself something to eat. Mrs. Godfrey called him around 5:00 to 5:30 o'clock, P.M., they argued, and she would not agree to reconcile with the petitioner and stated that she wanted all the property as well. Mrs. Godfrey hung up after saying she would call back later. The petitioner testified that he was extremely depressed by this. (Tr. 373, 375, App. 53)

Mrs. Godfrey called back later, approximately 7:30 o'clock, P.M., according to petitioner's testimony, but he was not sure about the time. (Tr. 376, 378, App. 54, 55, also 40, 41) This second conversation, according to the petitioner, was more heated and Mrs. Godfrey ended the call with a final rejection of petitioner's attempt to save the marriage and by again telling the defendant that she wanted all the property and would see him in court. Upon hanging up the telephone the defendant testified that he has never in his life experienced such a low feeling, as if kicked in the stomach, and then he blacked out and has no further memory of the subsequent events until the following day when he waked up in the Polk County Jail. (Tr. 379, App. 55)

The evidence, through various witnesses, established that the petitioner, at some time shortly after the

second telephone call, got his single shot 20 guage shotgun and walked down the hill to his mother-in-law's trailer where Mrs. Godfrey, Mrs. Wilkerson, the mother-in-law, and petitioner's 12 year old daughter were seated around a table playing cards. The petitioner then shot his wife through the window in the forehead killing her instantly and proceeded into the trailer and hit his daughter on the head with the gun as she ran out towards the married daughter's house. The petitioner then shot his mother-in-law in the head with one shotgun blast killing her instantly. Petitioner then called the Polk County Sheriff's office and told the dispatcher, after identifying himself, to tell the Sheriff that he had just blown his wife's and mother-in-law's heads off and to come and get him. (Tr. 198)

The petitioner then went outside into the yard and placed the shotgun in the branches of an apple tree. Then he went toward his married daughter's house near the road and sat down in a chair under a shade tree to wait for the police. When the police arrived he told him "they're dead, it's all over with", and showed one officer where the gun was placed in the tree. He was described by all of the officers as very calm looking, steady on his feet, with no odor of intoxicants on his breath, and it was all of the officers' opinion that he was definitely not intoxicated. (Tr. 276) Concerning his mental state at the time of the shootings, it is significant to note that all of his previous history of violence was associated with very heavy intoxication, whereas, on this occasion, he had not had anything to drink, (Tr. 364, App. 52, 53) and had not been drinking for some time prior to the killings in an attempt to help reconcile his marriage. (Tr. 181-189;

App. 19) Later at the Polk County Police station, according to one officer with whom he was left alone momentarily, and who neither made a tape recording nor written statement, nor asked the amazingly loquacious defendant to repeat it in company, the petitioner allegedly told this particular officer that he had done a "heinous" crime, had thought about it for a long time, and would do it again. (Tr. 239, App. 26)

At the trial, the defense marshalled testimony relative to the petitioner's mental state at the time of the shootings. Dr. William S. Davis, a highly qualified psychiatrist who is on the clinical teaching staff at Emory Medical School and is Past President of the Georgia Psychiatrists Association, testified that in his opinion the second telephone conversation with his wife, created such an emotional trauma and provocation that it caused the petitioner to go into a altered state of consciousness described by Dr. Davis as a dissociative reaction, as evidenced by the blackout of memory and the petitioner's previous history of blackouts. Dr. Davis further testified that in this state the petitioner's conscious will could not control his subconscious impulses and resulting acts. Dr. Davis had seen and treated the defendant in the mid-sixties in Rome when Dr. Davis was with the Harbin Clinic and had also seen him on two occasions, pursuant to court order in the month prior to the trial of the case.

The second visit to Dr. Davis' office at Peachtree Parkwood Mental Hospital, where he is Chief of Staff, was specifically for a sodium amytal (popularly known as truth serum) interview to determine, among other things, the petitioner's truthfulness concerning the loss of memory and the emotional trauma he felt at the

recognition that he would not, finally, be able to once again save his marriage. Significant portions from the transcript of Dr. Davis' testimony are set out as follows:

> "Q. Doctor, based on his relation of this history to you and your previous knowledge of him, were you able to upon your examination to form any kind of opinion to what the state of his mind was at that time—on the 20th after the last telephone call?
>
> A. Yes, I decided that on the 20th after the telephone call that he had a . . . what is known as a dissociative state, a dissociative attack, and that this attack lasted from the time he first realized that she was not coming back home until he woke up the next day in jail and came back to his senses at that point in time. (TR-313, APP-35) . . .
>
> A. Yes sir, a dissociative state, I guess a dissociative state is the most common psychiatric condition which is known to be one of the most common non-psychotic psychiatric conditions which is responsible for some alteration in consciousness. In a dissociative state a person can just actually cut off from his mine oh, stimuli such as say bodily sensations may not come through to awareness. He may cut off from his mind awareness of what is going on around him, he may cut off from his mind memory, all of these things can cut from mind when in a state of dissociation. And in such a state a person may be able to carry out thoughts, feelings, impulses, which he could not release were he in his

normal state of conscious awareness. I guess you might say in that condition a person might be acting sort of automatically, that his will, if you will, his will was absent or greatly reduced may be example . . . (TR-314, 315; APP-35, 36) . . .

Q. (Hypothetical questions stated) . . . The question is, assuming those facts are true, is that consistent with the type mental state that you have described to us, or unusual?

A. Yes, it is. A person in a state of dissociation can carry on a conversation and unless someone is familiar with dissociative states and happens to think about it, they could appear to be, you know, reasonably normal or almost completely normal. One thing about that whole scene that really struck me as further, at least in my mind, evidence that he was in a dissociative state was his very normalcy, if you will. The fact that he showed no emotional upset, that he was not torn up after having done such a thing as he did, the fact that he was very calm, very quiet about the whole thing, that in of its self to me is abnormal. The fact that he appeared so normal in such conditions is to me abnormal and says to me that there was something, you know, going on haywire inside his head. Whereas, the feeling was split off from the action that he had actually done, it had been dissociated. (TR-317, 318, APP-37, 38) . . .

Q. I am speaking of after the telephone call (the second phone call) with his wife. In your opinion was the defendant's mind or reasoning power to any extent impaired thereafter?

A. Okay, yes, I think that it was and it must have been because at that point in time he was . . . remembers being . . . he remembers being overwhelmed with a feeling of dispair. He remembers . . . well, he said he was like being kicked in the stomach, he said that he never . . . he had wrestled and he had fought but he had never been hurt when he finally realized that it was over. There was no chance for reconciliation, and then he says to me that everything just sort of faded away, went black, and I think at that point his conscious . . . the over . . . the emotion I started to say overwhelming emotion, I think the emotion of the final finality of her rejection really did overwhelm him and he went into this state of dissociation.

Q. Do you have an opinion as to whether or not his acts immediately thereafter that evening would be the product of his will?

A. I think that these are acts that he could not have done had he been at himself consciously. I think had he been in his usual state of conscious awareness this act was at the time so abhorrent to him that he could not have done it.

Q. While someone is in this state of dissociation, can they exercise control over their . . . does their will, conscious will, have the ability to exercise control over their automatic actions?

A. Not the same . . . no. Not to the same degree. Not to any thing like the same degree as would occur when he was normally aware and alert.

Q. When a person is in this type of state do

you have an opinion whether or not they are able to distinguish between right and wrong and to be able to consciously control their actions relative to that?

A. I think they might know the difference between right and wrong but their ability to control powerful emotional forces acting on them is markedly reduced and I think in such a state a person might very well not be able to exercise control to such a degree that he could prevent himself from doing something which he knew was wrong." (TR-330-324, APP-40, 41).

Dr. Davis testified that the petitioner could not remember the crimes even after receiving an injection of sodium amytal, although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

Several laymen opined for the State that they thought Godfrey was sane; however, his daughter testified that apparently, Mrs. Godfrey did not. (TR-181-189, APP-14).

The State's experts from Milladgeville, the State Mental Hospital, agreed with the description of the dissociative state as described by Dr. Davis, but, of course, felt that the defendant did not experience one. The State's psychiatrist and psychologist, as well as Dr. Davis, agree however that this dissociative state is not a psychotic condition. The State's experts were a young psychologist with ten months experience and the other, a psychiatrist who had been at Milledgeville for a good many years and who did not remember very much about the interview with the petitioner while he was at Milledgeville under court order for examination a month before the trial of the case.

On March 9, 1978, the jury brought back guilty verdicts on all counts of the indictment and upon the sentencing stage, fixed the punishment at death and designated as the aggravating circumstance or circumstances: "That the offense of murder was outrageously or wantonly vile, horrible, and inhuman." Even though the statutory aggravating circumstance reads as follows: "That the offense of murder was outrageously or wantonly vile, horrible, or inhuman *in that it* involved torture, depravity of mind, or aggravated battery to the victim." (Emphasis supplied by counsel) The District Attorney, in addressing the jury on the sentencing phase, had announced that torture was not involved, and aggravated battery was not involved. (TR-570, 571; APP-75, 76)

On Monday, March 13, 1978, the Court sentenced the defendant to death by electrocution and set the date at April 14, 1978 at 11:00 o'clock, A.M., and gave the petitioner ten years to serve on the aggravated assault conviction. A Motion for New Trial was timely made and after a few months waiting for the record to be prepared, the Motion was overruled and a Notice of Appeal was timely filed to the Georgia Supreme Court. Petitioner's Brief was filed in said Court October 22, 1978, and the case was argued November 20, 1978. The convictions and sentences were upheld by the Court, with two dissenting Justices, on February 27, 1979, and the Rehearing was denied on March 27, 1979.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The entire Georgia Death Penalty Statutory Scheme was attacked in a pretrial Motion to Dismiss which was overruled by the Trial Court and pursued as Enumeration of Error Number 19 in the appeal to the Georgia Supreme Court. In the brief before the Georgia Supreme Court, petitioner argued that Section B7 was unconstitutionally vague and that the partial finding of the statutory aggravating circumstance rendered the death sentence void on constitutional grounds but the Georgia Supreme Court rejected all of these arguments and approved the phraseology used by the jury.

ARGUMENT

The question presented by the Court in this case for consideration is as follows: In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Georgia Code Annotated Section 27-2534.1(b)(7) as to violate the 8th and 14th Amendments to the United States Constitution?

Counsel submit most emphatically that it has. The Georgia Supreme Court, in affirming the death sentence in this case, based upon a partial, incomplete and uncertain finding of the seventh aggravating circumstance, has construed such section so broadly as to violate the 8th and 14th Amendments. It has also rendered Section (b)(7) unconstitutionally vague as construed in this case. And furthermore, it has allowed

an unconstitutionally overbroad application of Section (b)(7) in this case.

(A)

Counsel submit that Section B7, as construed by the Georgia Supreme Court, is unconstitutionally vague under the 8th and 14th Amendments.

The Georgia Supreme Court affirmed the death sentence in this case upon the partial finding of the Seventh aggravating circumstance, i.e., "the offense of murder was outrageously and wantonly vile, horrible and inhuman", holding, in rather off-handed fashion that the "jury's phraseology was not objectionable." This seems particularly routine where such an important and sensitive question is involved. One can only guess that the Georgia Supreme Court assumed that the holding in *Gregg v. Georgia* forever insulated the Georgia Death Penalty Statute, including Section B7, from constitutional attack. This manifestly is not the case:

> "The Petitioner attacks the Seventh Statutory Aggravating Circumstance, which authorizes imposition of the death penalty if murder 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravating battery to the victim', contending that it is so broad that capital punishment could be imposed in any murder case. *It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will*

adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, see *McCorquodale v. State,* 233 Georgia 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture murder." *Gregg v. Georgia,* 428 U.S. 153, 96 S.C. 2909, at 2938 (1976) (Emphasis supplied)

Thus, this Court's approval of Section B7 as facially valid, was extremely tentative, particularly in light of the fact that this Court was construing it only to the extent required to consider the capital sentencing system as a whole, and in a case where Section B7 was charged but was not even found, even though it was a double murder for the purpose of robbery. See *Gregg v. Georgia,* 96 S.C. 2909, at Page 2938, N. 51.

Whereas, prior to the decision in *Godfrey,* it appeared that the Supreme Court of Georgia did not regard the first part, or general descriptive language, as severable from the second or more specific, illustrating part so long as there was some combination of the language from each part. However, just one month prior to the Georgia Court's decision in *Godfrey,* the Court upheld a finding of Section B7 by a jury in a death sentence case as follows:

"*by evidence presented to us, we the jurors conclude that this act was both horrible and inhuman.* We conclude that Bonnie B. Bullock, an 11 year old defenseless child, was taken by force and arms and was ruthlessly executed on July 26, 1976. This constituted a finding of two of the statutory aggravating circumstances (Code Annotated Section 27-2534.1(B)(2)(7) and it is supported by the evidence." *Ruffin v. State,* 243

Georgia 95, at Pages 106-107. (Emphasis supplied)

Clearly, this construction of Section B7, along with *Godfrey,* is tantamount to holding that Section B7 is composed only of the adjective, general phrase, that is, that the offense is "vile, horrible or inhuman". Because the language in Section B7 is stated in the disjunctive, it makes it possible that death sentences may be upheld upon a jury finding that the offense was "outrageously vile" or that "this act was horrible." (See Ruffin, supra. See also *Smith v. Goguen,* 415 U.S. 582, 94 S.C. 1242 at Page 1252, N. 31) (1974). Under this authoritative construction of Section B7, Georgia Trial Judges may change, and prosecutors argue to the jury that they only need to find that the offense was "horrible" or "vile", standing alone, to impose a sentence of death; as was argued by District Attorney in this case. (Appendix P. 76)

The question becomes then, whether such terms, taken individually or in combination, can objectively guide and channel jury discretion in the imposition of a death sentence in compliance with the command of the 8th and 14th Amendments as declared in *Furman* and affirmed in *Gregg, Woodson and Lockett*? It seems clear beyond reasonable question that they cannot, and that such a construction of Section B7 is unconstitutionally vague under the 8th and 14th Amendments.

This clearly takes one into unchartable terrain where a subjective adjective such as "horrible" is supposed to provide guidance to a jury determining whether to impose the unique and most extreme penalty of death. See *Woodson v. North Carolina,* 96 S.C. at 2990-2991. See also *Grayned v. City of Rockford,* 92 S.C. 2294 (1972) at Pages 2301-2302 relying on *Coates v. Cincin-*

nati, 402 U.S. 611, 91 S.C. 16 at 86, 29 L.Ed.2d 214 (1971). These are clearly words that permit of a highly subjective, personal interpretation and are not objective enough to meet constitutional objections as to vagueness, particularly where there are no further guidelines or narrowing definitions or directions provided in the Standard Georgia Sentencing Charge approved by the Georgia Supreme Court. (See Sentencing Charge, Appendix P. 79) One only has to look to various cultures of the world to see that there is substantial disagreement amongst human beings as to what is "horrible" or "inhuman" or "vile"; a practice in one culture may be perfectly acceptable there and viewed as horrible, inhuman or vile in another culture. Counsel submit that the same is most probably true of randomly selected individuals within a particular community.

Because of their subjective nature, such words are incapable of being found beyond a reasonable doubt to be a fact. The existence of torture or aggravated battery in a particular case can be objectively found as fact. But how does one find, or prove, beyond a reasonable doubt that a murder is vile, or is horrible, or is inhuman; or, perhaps more appropriately, how can one find that the taking of another human life is not each and all of those things? How can the three adjectives taken together be more definite or objective than each separately? How can the piling of three vague, subjective terms upon one another cure the defect? Clearly, it can make no difference.

For example, can the word "inhuman" have more meaning in the context of sentencing to death than it does in ordinary usage? Although human history contains much evidence to the contrary, in our democratic

Republic, where the dignity, uniqueness and integrity of the individual and the sacredness of life are primary values, it is simply an undeniable truism that "to take the life of another human being is inhuman."

Clearly, then, the terms "murder" and "inhuman" are co-extensive; to find murder present one naturally finds that it is inhuman. But one finds "inhuman" used frequently in ordinary usage outside of the context of murder, i.e., "cruel and inhuman treatment" in divorce law or any number of common, extralegal usages. Thus, the term cannot properly be used as an objective standard to guide untrained jurors in finding some special circumstance existing in a case beyond the fact of murder; and to find so as a matter of fact beyond a reasonable doubt in order to justify the sentence of death.

Clearly the same analysis applies to the term "vile". The word "horrible" is vastly elastic, construable differently in different contexts and thus, cannot be infused with more specificity just because used in the context of a capital crime; in any case, counsel would hate to have the endless task of collecting all those things classed as "horrible" by any random sampling of little old ladies in Cedartown, Georgia.

The terms are therefore impermissably vague because their enforcement or application depends upon a completely subjective standard. See *Grayned v. City of Rockford*, supra, at Page 2302. By this construction of Section B7, the Georgia Supreme Court does not narrow the meaning of the language as to the Supreme Court of Florida did when it ruled that the phrase "especially heinous, atrocious or cruel" means "conscienceless or pitiless crime which is *unnecessarily*

torturous to the victim." State v. Dixon, 283 So.2nd 1, 9 (1973). See *Proffitt v. Florida,* 96 S.C. 2960 at 2967-2968, and *Gregg v. Georgia,* 96 S.C. at Page 2938, N. 52. Clearly, the Supreme Court of Georgia has adopted the condemned, open-ended construction that this Honorable Court was not willing to assume in *Gregg v. Georgia* that it would. *Gregg v. Georgia,* supra, Page 2938.

If the death penalty can be upheld in Georgia upon a find that the offense of murder is "vile" etc., it seems clear that there would be no qualitative difference between that and imposition of the death penalty on the finding that the offense showed "depravity of mind." Indeed, the logic of the Georgia Court's construction of Section B7 would seem to compel such a result. The term "depravity of mind" is also clearly a highly subjective standard, difficult to understand by laymen. This is strikingly demonstrated in the recent Georgia case of *Johnny Lee Gates v. State,* Supreme Court of Georgia, Number 35053, decided October 24, 1979. Pages 611 and 612 of the transcript of that trial are attached hereto as addendum A, Pages 1 and 2. After the jury had been out for approximately 47 minutes during the sentencing phase they returned to the Court and requested that the Court define "depravity of mind to the victim", which is the erroneous way the phrase had been presented by the District Attorney and charged by the Judge. The Judge, anticipating their question, had Black's Law Dictionary and a couple of regular dictionaries and, after reading the definition of a "depraved mind" from Black's and the definition of "depraved" from the other two dictionaries, the Trial Judge said as follows:

> "That's what the legal dictionary says that depraved and depravity is. And so, my interpretation—and I hope it is correct—that his actions were so vile, horrible or inhuman *that he created such a state of mind in the victim as defined by the word depravity.* That is the very best I can do for you, ladies and gentlemen, I wish I could do better." (Emphasis supplied)

This utterly confused construction of that portion of Section B7 would be laughable if it did not involve such an important matter. If a Superior Court Judge can construe the phrase in this manner, what can reasonably be expected of the laymen who elected him? How can a jury be expected to apply such a subjective standard other than in an arbitrary and capricious manner contrary to this Court's holding in *Furman v. Georgia*? Strangely enough, the Georgia Supreme Court has addressed itself to this question in the case of *Holton v. State,* 243 Georgia 312, at Page 318, decided at the same time as *Godfrey*:

> "The jury fixed the punishment on both counts of murder as death 'by reason of depravity of mind'. This is only a part of a statutory aggravating circumstance. It omits all reference to the words 'outrangeously or wantonly vile, horrible or inhuman.' See Code Annotated Section 27-2534.1(B)(7). See also *Ruffin v. State,* 243 Georgia 95 (1979); *Godfrey v. State,* 243 Georgia 302 (1979). It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on *Furman v. Georgia,* 408 U.S. 238 (92 SC 2726, 33 L.Ed.2d 346) (1972); i.e., such an aggravating circumstance could be so broad as to allow the death penalty to

be imposed at random in any murder case. See *Gregg v. Georgia,* 428 U.S. 153 (96 S.C. 2909, 49 L.Ed.2d 859) (197.). Here, however, although the jury was polled, the Defendant did not object to the form of the verdict at the time of its return. Because there is to be a re-sentencing trial (See below), this problem should not rise again."

Quite obviously, counsel submit, Section B7 of the Georgia Death Penalty Statute, as construed in this case by the Georgia Supreme Court, cannot pass constitutional muster. It fails to adequately channel and focus capital sentencing discretion, and therefore, violates the 8th and 14th Amendments as construed in *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153, 195, N. 46 (1976) (Plurality opinion).

The basic requisite of a constitutionally valid capital sentencing procedure is that it provides "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976) (Plurality Opinion). Sentencing discretion in death cases must be "circumscribed by the legislative guidelines," Gregg v. Georgia, 428 U.S. 153, 207 (1976) (Plurality Opinion), which have been demanded by *Furman v. Georgia,* supra, and subsequent cases as an indispensable command of the 8th and 14th Amendments. See, e.g., *Lockett v. Ohio,* 438 U.S. 586, 601 (1978) (Plurality Opinion). "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia,* supra, 428 U.S. at 189 (Plurality Opinion). As

Gregg warns, a statutory capital sentencing system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." i.d. at 195 N. 46. Section B7 of the Georgia Death Penalty Statute, as construed in *Godfrey v. State,* 243 Georgia 302, 310 (1979), has become precisely that kind of vague standard, (if it has not been so all along, as counsel submit), and therefore, offends the 8th and 14th Amendments to the United States Constitution.

Section B7 is also void for vagueness under the traditional due process standards of the 14th Amendment. For due process forbids the imposition of sanctions (See *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966) under any procedure that "licenses the jury to create its own standard in each case," *Herndon v. Lowry,* 301 U.S. 242, 263 (1937), and is "susceptible of sweeping and improper application," *NAACP v. Button,* 371 U.S. 415, 433 (1963). See also *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940). "Moreover it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." *Smith v. Goguen,* 415 U.S. 566, 572-573, 94 S.C. 1242, 1247 (1974). "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of*

Rockford, 408 U.S. 104, 109-110, 33 L.Ed.2d 222, 92 S.C. 2294, 2299 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.C. 839, 843, 31 L.Ed.2d 110 (1972); *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.C. 1686, 1688, 29 L.Ed.ed 214 (1971). See other cases cited in *Grayned,* 92 S.C. at 2299 N. 4.

Section B7, as construed by the Georgia Supreme Court, permits the imposition of the penalty of death upon a finding of general language "of such a standardless sweep" that it allows "juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen,* 94 S.C. at 1248 (1974). The fate of the petitioner in this case turned upon the application to his case by twelve persons of a statutory phrase of complete subjectivity. Other defendants might be spared while Godfrey is condemned solely because one or two persons on the jury may differ in their personal subjective interpretation of what "horrible" or "vile", or "inhuman" means and how it applies to the facts of the particular case. "This absence of any ascertainable standards for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude there accorded . . . triers of fact. Until it is corrected either by Amendment or Judicial Construction, it affects all who are prosecuted under the statutory language" (*Smith v. Goguen,* 92 S.C. 1249-1250) and convicted of murder under the present laws of Georgia. Since the phrase "vile, horrible or inhuman" either used together, or singularly in the disjunctive, provides no "meaningful basis for distinguishing the . . . cases in which a death sentence . . . is

imposed from . . . the many cases in which it is not," *Lockett v. Ohio,* supra, 438 U.S. at 601 (Plurality Opinion), the Petitioner's death sentence is unconstitutionally arbitrary and cannot stand.

Counsel submit that the methodology of the void for vagueness doctrine is applicable to death penalty cases through the 8th and 14th Amendments. "The Constitution requires no more than that trials be fairly conducted and *that guaranteed rights of Defendants be scrupulously protected."* *McGautha v. California,* 402 U.S. 183, at 221, 91 S.C. 1454 at 1474. Cited in *Lockett v. Ohio,* 98 S.C. 2954 at 2975 (Rehnquist, J., dissenting). This case was decided pre-*Furman,* when no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. Thereafter, *Furman,* and cases since, identified a "guaranteed right" which must be "scrupulously protected"; that is, that a citizen has a right not to be subjected to the wholly capricious and arbitrary application of the extreme, and unique penalty of death. The protection of this right requires, among other things, that the discretion of jurors, in deciding between life and death, be guided and channeled by objective standards and guidelines. *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976) (Plurality Opinion). "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida,* 97 S.C. 1197, 1204 (1977). See also *Green v. Georgia,* 99 S.C. 2150, 2151 (1979); *Lockett v. Ohio,* 438 U.S. 586, 604-605, 98 S.C. 2954, 2964-2965 (1978) (Plurality Opinion); id., at 613-616, 98 S.C. at 2969-2970 (Opinion of Blackmun J.) For reference see *Hurtado v.*

California, 110 U.S. 516 (1884) (Harlan, J. dissenting), and *Adamson v. California,* 332 U.S. 46, 78-79 (1947) (Black, J. dissenting). In light of this doctrine, one is led, inexorably, to the conclusion that Section B7, as construed in *Godfrey,* is void for vagueness because it subjected him to the most extreme penalty under a standard so indefinite and subjective that the jurors were free to react to nothing more than their own predilections for application of the disjunctive, general language of Section B7 to his case. See *Smith v. Goguen,* 94 S.C. at 1250 (1974). It is simply intolerable under the Rule of Law Ideal, that such a judgment, arrived at by such a method, be Constitutional.

(B)

Firstly, counsel submit that the upholding of this death sentence on the jury's partial finding of the seventh aggravating circumstance constitutes, by way of analogy to the standards in civil law proceedings, an unconstitutionally overbroad construction of said Section.

Under the Georgia Death Penalty Statutory Scheme, the jury must find at least one "aggravating circumstance" beyond a reasonable doubt during the sentencing portion of the trial before a valid death sentence can be imposed. Counsel submit that the Statute itself, and earlier constructions of it, reasonably require that a whole or complete aggravating circumstance is intended. The seventh aggravating circumstance, which was the only one submitted to the jury in this case, is that the offense be:

> "Outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim" GSA Section 27-2534.1(b)(7). (Hereinafter referred to as Section B7)

In this case, the jury found beyond a reasonable doubt, on both counts of murder, that the death sentence should be imposed because:

> "The offense was outrageously and wantonly vile, horrible and inhuman." (Appendix, P. 80, 81)

Petitioner argued in his appeal to the Georgia Supreme Court, and in a supplemental brief after oral argument in that Court, that this partial finding was not a sufficient finding in contemplation of the law to support a judgment of death, in addition to attacking Section B7 as unconstitutionally vague. The Supreme Court of Georgia dismissed this argument in cavalier fashion as follows:

> "The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology is not objectionable." (Appendix, P. 106)

The Georgia Supreme Court had previously indicated that it did not regard the general adjective phrase of Section B7 (vile, horrible or inhuman) as severable from the second or illustrating phrase (which shows somewhat more specificity, except for "depravity of mind") which begins with "in that it involves". In *Harris v. The State,* 237 Georgia 718 at Page 733, in an opinion decided in September, 1976, three months after *Gregg v. Georgia,* was decided, the Georgia Court upheld Section B7 against unconstitutional challenge as to vagueness, and said in part as follows:

"We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involves torture or an aggravated battery to the victim *as illustrating the* crimes were outrageously or wantonly vile, horrible or inhuman." (Emphasis supplied)

In another case, the Defendant contended that, because the terms in Section B7 are stated in the disjunctive and are dissimiliar, Section B7 is not capable of unanimity without polling the jury to determine which parts of it each of the jurors found beyond a reasonable doubt. The Georgia Supreme Court, in upholding the death sentence in the case, held as follows:

"We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Considering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the Defendant, we find no room for non-unanimous verdicts for the reason that there is no probibition upon measuring cause on the one hand, by effect on the other hand. That is to say, the depravity of mind contemplated by the Statute is that which results in torture or aggravated battery to the victim. Thus, that aggravating circumstance specified in Code Annotated Section 27-2534.1(b)(7) is not incapable of unanimity." *Blake v. State*, 239 Georgia 292, (1977).

The Court in *Harris v. The State*, supra, Page 732, also analyzed the wording of Section B7, as follows:

"This aggravating circumstance involves both the effect on the victim, viz. torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the

offense) were outrageously or wantonly vile, horrible or inhuman.

Each of these terms used is clearly defined in ordinary dictionaries, Black's Law Dictionary or Words and Phrases, and is subject to understanding and appplication by a jury."

It appeared from the reading of these cases that the Georgia Supreme Court, without actually saying so, was relying on a general-to-specific principle of statutory interpretation, i.e. construing general language (vile, horrible or inhuman) to take on color from more specific accompanying language (torture or aggravated battery to the victim). See *Smith v. Goguen.* That some element from the second or illustrating phrase of Section B7 is necessary to be found along with the general descriptive language is readily apparent just from reading the sentence structure of Section B7. This analysis is highlighted by comparing B7 to, for instance, Section B5 which reads in part as follows: "the murder of a judicial officer . . . during or because of the exercise of his official duty." It is perfectly obvious that a jury finding of a judicial officer being murdered without the further finding that it was related to the exercise of his official duty would clearly be insufficient, standing alone, to support a judgment of a death sentence. This construction of Section B7 is clearly persuasive when one considers that it is the Section most subject to an openended, vague construction and an arbitrary, capricious application.

Therefore, counsel submit that, even if the entire language of Section B7 is facially valid (which counsel dispute), such a partial, incomplete jury finding supporting a death sentence is unconstitutionally broad

where such a partial finding by analogous reasoning, would not even be sufficient to support a civil judgment in a routine matter.

Counsel submit that there is a striking analogy between the civil practice of special jury verdicts, or special interrogatories to the jury and the procedure in the sentencing phase under the Georgia Death Penalty Statute. In a civil case, the special verdict, found by the jury pursuant to a special interrogatory submitted to them, forms the basis upon which the judge renders the judgment required by applying the law to the jury's special finding. In death sentence procedure under the Georgia Statute, the jury's finding of a statutory aggravating circumstance beyond a reasonable doubt (presumably a complete one) forms the basis upon which the judge renders the judgment required by law, i.e., the death sentence.

In civil law, if the jury's special finding is incomplete, partial or vague, no valid judgment could be rendered upon it, or, if rendered, it would be void for uncertainty.

In the old Georgia case of *Burke v. Schwarzweiss,* 153 Georgia 751, 113 S.E. 16, a special verdict finding by the jury in a promissory note dipsute involving two notes, that there was due from the maker of two notes the amount of "note" with interest less credits and from the endorser the amount of "notes" with interest less credits was *held void for uncertainty.* (Emphasis supplied)

> "A verdict says Coke (*Co. Litt* 227, a) finding matter uncertainty and ambiguously is insufficient, and no judgment will be given thereon.
>
> A verdict which finds but part of the issue and says nothing as to the rest is insufficient." *Prentice v. Zane's Administrator,* 49 U.S. 470, 8 How. 470, 12 L.Ed. 1160.

Also, in 1882, the first Justice Harlan held as follows in a case also involving a promissory note:

> "Looking, therefore, as we must, to the case as disclosed by the record, we are constrained to hold that the answers to the special questions propounded by the Court, being silent as to the assignment by the bank, did not furnish a basis for judgment in favor of the Plaintiffs . . . In *Patterson v. The United States,* 2 Wheat. 221, it was said, that if it appeared to the court of original jurisdiction, or to the Appellate Court, that the verdict was confined to a part only of the matter in issue, no judgment could be rendered upon it. In *Bonds v. Williams,* 11 Wheat. 415, the claim of the Plaintiff being founded upon a bequest of certain slaves, was essential to a recovery, at law, that the assent of the executor to the legacy should be proved. This Court, speaking by Mr. Chief Justice Marshall, said: 'although in the opinion of the Court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the Court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the Plaintiff'." . . .
>
> "It was the province of the jury to pass upon the issues of fact, and the right of the Defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not have been taken away by the Court . . . It has often been said by this Court that the trial by jury is a fundamental guarantee of

the rights and liberties of the people. Consequently, every reasonably presumption should be indulged against its waiver. For these reasons the judgment below must be reversed." *Hodges v. Easton,* 1 S.C. 307, 106 U.S. 408, 27 L.Ed. 169 (1882).

Surely, in matters of life and death, the applicable standards should be no less. In deed, in view of the recognized qualitative difference between death and other criminal penalties, as well as the difference between the applicable burdens of proof in criminal and civil cases, one is compelled to the conclusion that the law "calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio,* 98 S.C. 2954, 2964 (1978).

Therefore, since the Georgia Supreme Court has upheld a death sentence in this case upon a jury's partial, incomplete finding upon a special verdict that would not support a judgment of civil law, then it follows, reasonably and logically, that, in ignoring such niceties of law, the Georgia Supreme Court has adopted an unconstitutionally overbroad construction of Section B7.

Since the words "vile, horrible and inhuman" contain only the subjective portion of Section B7, and since the Georgia Supreme Court's construction, open-ended, rather than narrowed, allows these subjective terms to stand alone as guidelines to jury discretion in considering between life and death, "it does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable, the process for imposing a sentence of death." Woodson v. North

Carolina, 96 S.C. 2978, at 2990, 2991. This creates a substantial risk that the death penalty will be imposed in Georgia under Section B7 in a wantonly arbitrary and capricious manner with "no meaningful basis for distinguishing the few cases in which it was imposed from the many in which it was not." *Furman v. Georgia,* 92 S.C. 2762, 2764. (Stewart, J., and White, J., concurring) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the 8th and 14th Amendments." *Lockett v. Ohio,* 98 S.C. 2954, at 2965 (Burger, C.J., plurality opinion)

Since the Constitution of the United States "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged", *In re Winship,* 397 U.S. 358, 364 (1970), see also *Jackson v. Virginia,* 47 USLW 4883 (June 28, 1979), the same standard of proof is constitutionally required to establish any fact upon which a death sentence is to be based; for the "qualitative difference between death and lesser criminal penalties entails . . . a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion)

In *Godfrey,* the jury, during the sentencing phase, was instructed by the District Attorney that torture and aggravated battery were not involved in this case. (Tr. 570, 571; Appendix P. 75, 76). Therefore, the jury's sentencing verdict should have found beyond a reasonable doubt that "the offense was outrageously and wantonly vile, horrible and inhuman *in that it involved*

depravity of mind"; i.e., "depravity of mind" should have been found as a matter of fact beyond a reasonable doubt in order that the verdict be complete. Since the jury did not so find (quite suspiciously in view of strong psychiatric testimony in Defendant's favor) and the trial judge imposed the judgment of death upon this insufficient finding of the aggravating circumstance, the affirmance by the Georgia Supreme Court demonstrates that the Court has adopted an overbroad construction of Section B7 in violation of the 8th and 14th Amendments to the United States Constitution.

(C)

I

Counsel submit that the Georgia Supreme Court has applied Section B7 to the petitioner's case in such an overbroad way as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

The Georgia Court has previously indicated, three months after *Gregg v. Georgia* was decided, that it would not adopt this open-ended approach:

> "Under our duty specified in Georgia Code Annotated Section 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch-all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.
>
> This Court has affirmed death sentences involving this statutory aggravating circumstance. The cases were:

(1) *House v. State,* 232 Georgia 140, 205 S.E.2d 217 (1974) cert. den., 44 LW 3762, in which the defendant was found guilty of strangling his seven year old boy to death after committing rape (anal sodomy) upon him.

(2) *McCorquodale v. State,* 233 Georgia 369, 211 S.E.2d 577 (1974), cert. den., 49 L.E.2d 1218, in which the defendant beat, whipped, burned, bit and cut his bound victim, put salt on her wounds, and sexually abused her prior to murdering her by strangulation.

(3) *Banks v. State,* 237 Georgia 325 (1976), in which the defendant killed two non offending defenseless persons in an execution style killing by gunshot. (There was also evidence that the man's wallet and some other personal items were missing from the bodies–supp. by counsel)

> We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. *Each of these cases is at the core and not the perphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstances to those cases that lie at the core.* See Florida's approach to a similar problem in *State v. Dixon,* 283 So.2d 1, 110 (1973), cited with approval by the Supreme Court of the United States in *Proffitt v. Florida,* 96 S.C. 2960, 49 L.E.2d 913 (1976)." (Emphasis supplied)

If a Statute is facially valid, (which counsel here dispute) to determine whether it has been over-broadly applied to an individual, or over-broadly construed in

general, one must, of necessity, examine the stated intent of the law as measured against the factual circumstances within which it is applied.

There can be little doubt that the Georgia Death Penalty Statute, on its face, intended to narrow the range of the applicability of the death penalty within each class of capital crime, e.g. murder. See *GCA Section 26-1101*(a)(b)(c) (1972). For, "it is recognized that individual culpability is not always measured by the category of the crime committed." *Woodson v. North Carolina*, 96 S.C. at 2988 (1976) (Stewart, J., quoting Burger, C.J., dissenting in *Furman v. Georgia*) Thus, the State of Georgia attempts to guide jury discretion in making distinctions through the statutory scheme considered by this Court in detail in *Gregg v. Georgia,* 96 S.C. 2921, N. 9, GCA Section 27-2534.1, requiring the finding of certain aggravating circumstances beyond the guilt of murder, before the imposition of the death penalty is authorized. There are nine such aggravating circumstances setting out particular type murders, felony murders, particular circumstances, and particular individuals, and then there is Section B7, herein involved.

Under the *Furman* reasoning, Section B7 could not become a 'catch-all' to authorize the death penalty in all other types, and sub-types, of murder, regardless of the factual circumstances: that it could be used for this purpose is obvious upon examination of its largely vague language, as this Court recognized in *Gregg v. Georgia,* 96 S.C. at 2938. Otherwise, if one did not presume the statutory intent to be one of limitation, the statutory scheme would cover all types of murder and become a largely mandatory scheme, which has

been disapproved. *Woodson v. North Carolina,* supra.; *Roberts v. Louisiana,* 96 S.C. 3001.

Under the circumstances, one would not expect to see the death penalty being imposed in "domestic murder cases". These type cases have traditionally been accorded almost a separate sub-category murder. They have usually involved strong emotions, mental and emotional disturbance, caused by the stormy nature of the relationship between husband and wife; they usually involve threatened or impending breakup of the marriage and home, strongly opposed by one party; or, the discovered or revealed, paramour situation.

That "domestic murder cases" are a traditionally distinct sub group and are not ordinarily thought susceptible to Section B7 was implicitly recognized by the Georgia Supreme Court in *Dix v. State,* 238 Georgia 209 at 216, 232 S.E.2d 147 (1976), where the defendant tortured and killed his ex-wife, Dixie Jordan, and then kidnapped her mother, sister and niece:

> "Although lesser sentences than death are frequently imposed in *domestic murder cases,* it does not follow that the death penalty would not be authorized for murder of one spouse by another under any circumstances. The Statute does not forbid imposition of the death penalty upon marital murders; it merely requires that statutory aggravating circumstances exist. They exist here. The evidence showed that the victim was deliberately and methodically tortured by being cut and carved as well as strangled before being put to death. The fact that this couple had been married does not prevent imposition of the death penalty. See *Smith v. State,* 236 Georgia 12, 222 S.E.2d 308 (1976)."

Counsel is aware of only two other cases pending in

Georgia where death sentences were upheld which involved husband and wife or ex-husband and wife:

> *Smith v. State,* 236 Georgia 12, 222 S.E.2d 308 (1976), where a man drove to Georgia from Florida with an accomplice and murdered his wife's ex-husband, and his new wife, with a shotgun, so the killer's wife could collect insurance money on her ex-husband for herself and children. Both husband and wife were sentenced to death under GCA Section 27-3534.1(b)(4), that the murder was "committed for the purpose of receiving money or any other thing of monetary value." Section B7 was not found. This case appears also in *Godfrey* in the Appendix listed amongst those cases found "similar", "considering both the crime and the defendant. Code Annotated Section 27-2537(c)(3)." Then there is the case of *Alderman v. State,* 241 Georgia 496, 246 S.E.2d 642 (1978). In this case, Alderman approached a close friend, John A. Brown, and asked him to help him kill his wife, Barbara J. Alderman. The defendant promised Brown that he would split the proceeds of his wife's insurance with him. Alderman pulled a gun on Brown and made him hit Mrs. Alderman in the back of the head with a 12 inch crescent wrench which Alderman had given him. When she ran into the living room they both tackled her and attempted to strangle her and when she passed out, Alderman submerged her in the bathtub and drowned her. He then took her into the next County, put her behind the wheel of her car and ran her car off a bridge so that it would appear that she had a wreck, fell out of the car and drowned on the way to her Aunt's house. The jury convicted Alderman and imposed the death sentence finding both Section B4 and Section B7, finding the entire Section.

It is quite clear that killing for money takes these cases out of the category of domestic murders. Therefore, counsel submit that the petitioner is the only "domestic murderer" under death sentence in Georgia at present.

Furthermore, if one compares cases by considering the factual setting, the background, the *mens rea* and mitigating circumstances, it is clear that the petitioner's case bears no real "similarity" to the fifteen cases listed in the Appendix to the *Godfrey* decision. This is done pursuant to the Statutory Sentence Review Process by which the Georgia Supreme Court compares the death sentence with those similar ones where the death sentence has been upheld "considering both the crime and the defendant". GCA Section 27-2537(c)(3). This Court, in *Gregg v. Georgia,* viewed this mandatory sentence review as a "important additional safeguard against arbitrariness and caprice", 428 U.S. at Page 198; counsel submit that in this case, that safeguard has been insufficient and further evidences that the Georgia Supreme Court has adopted an unconstititionally overbroad construction of Section B7 in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

A brief look at the cases listed in the Appendix to the Godfrey decision will show that they are not "similar" in the commonly use sense of the word:

> *House v. State,* 233 Ga. 140 (1974), where the defendant was found guilty of strangling two seven year old boys to death after committing anal sodomy upon them, found Section B7 only;
>
> *Gregg v. State,* 233 Ga. 117 (1974), where the defendant was picked up hitchhiking by two men

and as they went outside the car off of the interstate to use the bathroom, he shot both of them for the purpose of robbing them, and only Section B2 was found, however, Section B7 was charged;

Floyd v. State, 233 Ga. 280, (1974), where the defendant entered a stranger's home on the pretext of using the telephone and tied the mother and 16 year old daughter up before shooting them twice in the head–Section B(2) on robbery was found and Section B7 was found using the adjective phrase and specifying that it involved torture to the victims;

Chenault v. State, 234 Ga. 216 (1975), where the defendant killed Mrs. Martin Luther King, Sr., and another man during a crowded church service–and only Section B3, creating great risk of death to more than one person, was found;

Smith v. State, 236 Ga. supra; *Burke v. State*, 236 Ga. 850, and companion case Gaddis v. State, 239 Ga. 238 (1977), where the two burglarized the home for the money and robbed an elderly couple at gunpoint before strangling them slowly to find out where the rest of their money was–Section B2, Section B7, and Section B7 were found;

Coleman v. State, 237 Ga. 84, *Isaacs v. State*, 237 Ga. 105, and *Dundee v. State*, 237 Ga. 218 (1976), companion cases where the three entered a home for the purpose of burglary and then as each member of the household arrived, they were killed before taking one of the women and raping her and mutilating her breast before killing her--six members of the family were killed in all and the jury found Section B2 three times for Coleman and Dungee and four times for Isaacs–Section B7 was not found;

Banks v. State, 237 Ga. 325 (1976), where the

defendant killed a couple of strangers in the woods under circumstances held to show torture, there was evidence of robbery although the jury found Section B7 only–Banks had a prior conviction of murder which had been reversed and he had pled to manslaughter;

Young v. State, 239 Ga. 53, where Young had beat, kicked stumped six elderly persons, three of whom died, in order to burglarize and rob them–jury found Section B2 and Section B7;

Peek v. State, 239 Ga. 422 (1977), where the defendant killed two men by beating them to death with a stick, one of them being a witness killing, and also kidnapped and raped a woman during the same transaction–the jury found Section B2 twice but did not find Section B7;

Westbrook v. State, 242 Ga. 151 (1978), and *Finney v. State*, 242 Ga. 582, where the defendants robbed, kidnapped and then took two elderly women out into the woods, tied them up, and beat them to death with 2 x 4 boards–the jury found Section B2 and Section B7 and Westbrook had a record of 11 burglaries, one larceny, two weapon charges, and two escapes.

Counsel are not contending that the petitioner has a constitutional right to a proper sentence review. We only make these comparisons to point out the dramatic over-breadth of the application of Section B7. When one considers the fact situation in *McCorquodale*, or *House*, as compared with that of *Godfrey*, it practically encompasses the entire category of murder in the first degree. In *Harris v. State*, the Georgia Supreme Court declared an intention to stick to the "core and not the periphery" cases. One would think that this case would be of the periphery and not at the core. In *Godfrey*,

there was strong psychiatric testimony favorable to the defendant to the effect that due to a dissociative condition the defendant was unable to control his actions and did not even recollect the crime under "truth serum". Also, the victims were his wife and mother-in-law with whom his wife was living at the time awaiting a divorce action after the following day, and who had vigorously encouraged his wife to finally put an end to the marriage. There was evidence that their marital history had been stormy, highly emotional, at times violent; that his wife had committed him to Milledgeville State Mental Hospital on three previous occasions, to which he acceded as a condition of a reconciliation with her; and that there had been highly emotional arguments between them by telephone shortly before the shootings. The affirmance of the death penalty in this case must be construed to mean that the Georgia Supreme Court considers the "periphery" cases to be manslaughter.

However, if one considers the cases before the Georgia Supreme Court where life sentences were given, one finds a large number of cases similar to Godfrey's. [*Footnote:* At Mr. Rodak's suggestion, counsel are filing with this Brief, a special supplemental addendum not to be printed but lodged in the Clerk's office for reference; a copy of the same will be served on the Attorney General of Georgia also. This special addendum comprises approximately 104 pages of xerox copies of life sentence cards prepared by Dennis A. York, the Administrator provided for by Statute, who helps the Georgia Supreme Court keep track of cases. These life sentence cards are the summations of fact that the Georgia Supreme Court Justices consider

according to Mr. York in his deposition. These materials were obtained pursuant to notice to produce and deposition of Mr. York in the Civil Habeas Corpus proceedings styled *McCorquodale v. Charles Balcolm*, Warden, et. al., Civil Action File Number C-79-95A, pending now in the United States District Court for the Northern District of Georgia, Atlanta Division.] These materials reveal that of the 221 life sentence cases, 45 of them can be fairly designated as "domestic murders". The State had waived or withdrawn the death penalty in all of those domestic murder cases except 14. And in those 14, the jury refused to impose the sentence of death (They are *Johnston v. State*, Page 4 of Special Addendum, *Bond v. State*, Page 14, *Brown v. State*, Page 18, *Proveaux v. State*, Page 19, *Simmons v. State*, Page 19, *Olins v. State*, Page 28, *Edwards v. State*, Page 63, *Flury v. State*, Page 64, *Crower v. State*, Page 65, *Staymate v. State*, Page 85, *Ramey v. State*, Page 87, *Richardson v. State*, Page 88, *Burger v. State*, Page 89, and *Wilcox v. State*, Page 100.) There were several cases very similar to Godfrey's where the death penalty was waived: *Reville v. State*, Page 44, *Smith v. State*, Page 8, *Freeman v. State*, Page 26, *Lindsey v. State*, Page 36, *Reeves v. State*, Page 43, *Mitchell v. State*, Page 90, and *Allanson v. State*, Page 54, which involved multiple murders.

In addition there were several cases very similar to Godfrey where the death penalty was sought and the jury gave life: *Bonds v. State*, Page 14, where the husband shot the wife in the presence of the children; *Flurey v. State*, Page 64, and *Burger v. State*, Page 89, where there were multiple victims and there was a showing that they begged not to be shot.

Concerning *Reville v. State*, 235 Ga. 71, the prosecutor in this case read excerpts from this case in front of the jury during argument on guilt and innocence in order to leave the impression that the Supreme Court of Georgia had already decided a case just like Godfrey's against the defendant. This issue was raised on appeal and appears on Page 39 of the Petition for Certiorari in this case and also appears in the printed Appendix, Page 71. After reading from the facts of the case, the District Attorney ended up concluding as follows:

> "The exact case, exactly like this except for the fact that there was only one person, the man's wife, dead and he could remember nothing about the shooting or denied any memory of the shooting." (TR. 506, 507, App. P. 71)

It is only fitting justice now, that the State should be held accountable for those words and required to point some other basis for explaining why *Reville* received a life sentence, whereas, Godfrey received the death sentence, where the cases were exactly alike, in the State's words, other than that this most clearly demonstrates the arbitrariness and capriciousness, and thus unconstitutionality, of the Georgia Supreme Court's construction of Section B7.

II

Since the statutory aggravating circumstance B7 has such obvious proclivity to overbroad construction and application by juries, thus arbitrary and capricious, in violation of the 8th and 14th amendments; and since

the statute does not set out concrete mitigating circumstances as in Florida, see *Proffitt v. Florida*, 428 US 242, (see also Ali, Model Penal Code Section 210.6, 1962 upon which both laws were obviously based), one would reasonably expect the Georgia Supreme Court to insist upon narrowing jury charges that would properly channel, focus, and guide jury discretion.

The statute can be read and construed to require that this be done:

> "(b) . . . or he shall include in his instructions to the jury for it to consider, (any mitigating circumstances or aggravating circumstances otherwise authorized by law) and (any of the following statutory aggravating circumstances) which may be supported by the evidence . . ." (see GCA Section 27-2534.1)

These concrete examples of mitigating circumstances could be pointed out in addition to the general definition of mitigation now given in the standard trial jury charge at the sentencing. (See Appendix Page 79) The Georgia Supreme Court has missed several opportunities to require that instructions specify what mitigating factors, in contemplation of law, are raised by the evidence; or even to let the jury know, authoritatively in charge, what the law usually contemplates as "mitigation". This is not a common lay term. It will not suffice for the Court to simply rely on the defendant, or defense counsel, to point out to the jury whenever there may be any evidence which could be consideered in mitigation. The point is that the law, either on its face or as construed and applied by the Courts, is required to focus, and guide by objective standards, jurors' discretion in the matter of life and

death. "Legislatures [and Courts] may not so abdicate their responsibility for setting the standards of the criminal law." *Smith vs. Goguen*, 94 Supreme Court at 1248 (1974).

Those fimiliar with trial dynamics know the force and authority that the Court's charge has for a jury. The typical jury has been told from the beginning of the trial that what the lawyers say is not to be considered as evidence and that they are to take their *law* in charge from the Court, and not from anything the lawyers might say. In this capitol sentencing context, the position taken by the Georgia Supreme Court delegates to the defense counsel the task the law directs to the Judge; that is, to point out what evidence in the record is, in contemplation of law, a mitigating circumstance. See GCA Section 27-2534.1 (b). Under the circumstances typically, the defense attorney tells a jury at the sentencing stage that an (a), or (b) or (c) factor, present in the case, is a recognized mitigating circumstance; then the District Attorney tells the jury what aggravating circumstance they may consider. Then the Court, in charge, reenforces the District Attorney, while giving no apparent, concrete support to the defense attorney's position. The disadvantage to the defense is clear. One can imagine what effect this has in a jury room:

> Juror A–"Well, it just seems like to me that the Judge, he is a'going along more with the DA than with that other feller."
>
> Juror B–"Yeah . . . an you know that feller is a'gittin paid to try to git his client off. He's talking about how the *law* says we's s'posed to look at his client's clean record and how bad upset he was . . . ain't they been tellin us all

> along here to look to the Judge for the law?–Well, he didn't say nuthin 'bout that business."

Counsel certainly intends no disrespect to jurors and believes, with Jefferson, that the people are by far the best and safest ultimate repository of power. However, "it is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberation." *Gregg vs. Georgia*, 96 Supreme Court at 2934 (1976) However, in this case the trial Judge's sentencing charge just gave the language of Section B7 without definition or elaboration and merely told the jurors that they could consider any mitigating circumstances they found, giving an abstract definition only of what mitigation is. (See Appendix, Page 79)

When sophisticated legislative committees and judges, who favor the vigorous use of the death penalty, begin to speak in glowing and confident terms about the ability of the average juror to fully understand and apply such legal concepts with only the slighest sort of guidance and instruction in so an important matter, one gets a bit suspicious. Most assuredly, juries are not turned loose on an important tort case upon such meager fair. One gets the feeling that what is wanted is as little guidance and rational restraint as possible on the community's instinct for retribution; rather, they want it unleashed–frequently. "The instinct for retribution is part of the nature of man, in channeling that instinct in the administration of criminal justice serves as important purpose in promoting the stability of a society governed by law." *Gregg vs. Georgia*, 96 Supreme Court at 2930 (1976) The prosecution in *Godfrey* sought the advantage of this instinct for

retribution in trying the case at the first opportunity, even though defense counsel had filed motions to continue to allow community outrage and indignation time to cool. The trial judge overruled this motion and the Georgia Supreme Court upheld the discretion when all knew the purpose of the prosecution's tactic and the fundamental unfairness of it.

When one views these things together, the vagueness of Section B7, the absence of mitigating circumstances in the statute itself, and the Georgia Court's omission on reasonable sentencing charges, one begins to sense a grudging, cynical compliance with the command of the Constitution, as construed in *Furman vs Georgia.* The wording of Section B7 and the absence of concrete examples of mitigation in the statute suggest it; the Georgia Supreme Court's construction and application of it in this case confirms it.

In response to the numerous objections, in various cases, to the lack of such simple, concrete, wholly untroublesome instructions, citizens on trial for their lives have been answered thusly:

> "The trial court instructed the jury to consider the facts and circumstances in mitigation and aggravation, explaining to them that mitigating circumstances are those which do not excuse the offense, but which in fairness and mercy may reduce the degree of moral culpability or blame. He further instructed them that they were free to recommend mercy even if they found aggravating circumstances to exist. These instructions allow the jury to examine the defendant's individual characteristics in deciding his fate. The jury was properly instructed as to what it was to consider in reaching its decision as to sentence. *Fleming v. State,* 240 Georgia 142, 240 SE 2d 37 (1977); *Hawes v. State,* 240 Georgia 327, 240 SE 2d 833 (1978); *Spivey v. State,* 241 Georgia 477, 241 SE 2d 236 (1978) cert. denied 99 Supreme Court 642 . . .
>
> As for the fact that the trial court failed to give examples of mitigating circumstances, it is not required that specific mitigating circumstances be singled out by the Court in giving its instructions to the jury. *Potts v. State,* 241 Georgia 67, 86, 243 SE 2d 510 (1978), *Spivey v. State,* Supra. *To influence the jury by use of examples might limit their discretion to consider other matters in addition to the examples given.* Defense counsel, in argument to the jury, can point out all the mitigating circumstances available and a non-specific charge allows the jury to consider anything it deems worthy. We find no error in these enumerations." *Gates v. The State,* Georgia Supreme Court Number 35053 decided October 24, 1979.

This argument, that concrete examples of mitigating circumstances might limit the juror's discretion in a way unfavorable to defendants, sounds vaguely familiar. We have heard this type argument in this Country before; this empty solicitude for phantom limitations on citizens' rights. This was the discredited argument Hamilton and other anglophiles, made against having a concrete, enumerated Bill of Rights: their argument was similar, since everyone knows, they said, and understands what the rights of free men are, it might limit them to list them in a Bill of Rights to the U.S. Constitution (see Federalist Papers, no. 84) It is inconceivable that the blessings of Liberty could have been so well preserved and protected without a written Bill of Rights. Likewise, in this context, it is as hard to believe that specifying concrete examples of mitigating circumstances in charge would hurt or limit a defendant

as it is to believe that we would be addressing the question before this Court in the absence of an 8th Amendment.

So, along with the absence of mitigating circumstances in the statute itself, and the presence of vague language, vaguely construed, this glaring omission of the Georgia Supreme Court to take the opportunity to narrow, guide and channel jury discretion, where it is clearly foreseeable that overbroad and thus capricious and arbitrary application may result, further evidences that the Georgia Supreme Court has adopted an unconstitutionally broad construction of Section B7 in violation of the 8th and 14th Amendments to the U.S. Constitution.

Counsel submit in conclusion, that this endeavor, to continue punishment of death, unrestrained and uncircumscribed by reasonable objective guidelines, under the guide of "boilerplate" guidelines, is ultimately an attempt to subvert the Rule of Law. It is an attempt, if you will, to get at the "Devil" thus sacrificing and circumventing the primacy of the Rule of Law. This point has rarely been made with such eloquence and simplicity as in the oft-quoted dialogue between Sir Thomas More and his incautious young associate in Robert Bolt's play "A Man For All Seasons" 66 (1962):

> Roper: "So now you'd give the Devil benefit of law!
>
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> More: Oh? . . . And when the last law was down,

> and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws not Gods—and if you cut them down—and you are just the man to do it—d'you really think you could stand upright in the wind that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake."

CONCLUSION

The judgment of the Georgia Supreme Court affirming the petitioner's sentence to death should be vacated and reduced to a life sentence.

Respectfully submitted,

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ADDENDUM "A"

Gates v. State, Ga. Sup. Ct. #35053 Oct. 24, 1979

after you have unanimously agreed upon it and have completed it, have your foreman to then date it and sign it and return it into Court. Please retire to the jury room, ladies and gentlemen.

(WHEREUPON, THE JURY RETIRED
(FROM THE COURTROOM AT 4:17
(P'M')

THE COURT: Ask the jury to come in.

(WHEREUPON, THE JURY RETURNED
(TO THE COURTROOM AT 5:00 P.M.

THE COURT: Mr. Foreman, ladies and gentlemen, do you have a question?

THE FOREMAN: Yes, sir, we have a question. We would like a definition of the following phrase: Depravity of mind to the victim.

THE COURT: All right, sir. I anticipated that was going to be your question. That's why I've got these dictionaries here. And I can only give you the definition of what a depraved mind is in the dictionary.

One legal dictionary here, Black's Law Dictionary, says a depraved mind is an inherent deficiency of moral sense and rectitude, equivalent to statutory phrase, "depravity of heart" defined as highest grade of malice.

And the definition of deprave is to defame; vilify; exhibit contempt for.

Now, this is a bigger dictionary and let me see if I

can give you the definition of that. And that is as far as I can go gentlemen. The legislature created that law and they did not place a definition in the Code on it.

This dictionary says the definition of depraved is to make bad the judgement rather than making it more discriminating, to pervert the meaning of something, to make corrupt, to bring about the moral debasement, to reduce in value.

That's what the legal dictionary says that depraved and depravity is. And so, my interpretation–and I hope it is correct–that his actions were so vile, horrible or inhuman that he created such a state of mind in the victim as defined by the world depravity.

That is the very best I can do for you, ladies and gentlemen. I wish I could do better.

THE FOREMAN: In that case, we shouldn't be very long in reaching a verdict.

THE COURT: All right, sir.

(WHEREUPON, THE JURY RETIRED

(FROM THE COURTROOM.

MR. CAIN: Your Honor, now that the jury has

SUPPLEMENTAL REPORT

February 24, 1978, interview with Clarence Reeves. Clarence, will you state your full name for me please? Clarence William Reeves. What is your address? 734 Pace Street. Okay, you understand that we are tape-recording this statement. Right. And that is with your permission, right. Earlier I advised you of your rights, do you understand them? Yes sir. Okay, and there are no threats or promises made to you to get you to give us this statement, is that right? That's right. Present is Preston Worthington and John Dean and we are at the Cedartown Police Department.

Clarence, if you don't mind, and if you would, just tell us, in your own words exactly what happened yesterday. Well, it dates back to around, long about, somewhere long about December, when it all really started I expect. I had to send my wife to that mental institution up here in Rome. She come out and before that night there though we had our house to burn. I redone all the house, fixed it all back, bought her new furniture and everything throughout. Then after she got out of the Rome Regional Hospital, she just up and told me after I got all the furniture in there to pack my clothes and go that she really didn't need me anymore. So I packed them and I left. And then I got with my oldest son yesterday after we went up to divorce court. They told me what I had to do. I had to give her my house. $70.00 a week, which was all right with me at the time and that I told them I would go ahead along with anything like that. So I turned around then and I got with my son and carried him with me.

What's his name, Clarence? Kenneth William Reeves.

And I carried him with me over to Marato Mfg. Co. to check on a fence that they were putting up for me so I could give them a bill. Over there I left the bill and I come back by Rockmart at Billy Ballew's and I got me a six pack of beer. I drank about 3 of those and my son, I started to take him to his mama so I could give her the $70.00 to get groceries with. So he told me he knew exactly where she was at, at this mans house. I didn't even know she was going with this man or nothing at all until yesterday. This is the First idea you've had about it? First idea is when my boy told me. What time was that Clarence yesterday? That was sometime around 5:00 or 5:30 around there is when he told me about it. So we rode on across the mountain there and I drank 3 of the beers and come into town. So he showed me where she was at and I walked up to the door, and they were in there all hugged up and under the circumstances that they had just come out of court and everything it was just more than I could take.

And where was this Clarence? That was on Clyde Drive. Here in Cedartown? In Cedartown, at the man's house. I had never seen this man before in my life. Walked in; How did you get in the house? Well when they seen me, she broke and run and he opened the door, I reckon he was gonna try to come out by me. And then I stepped in the house and I shot her one time and I shot him twice. Or I shot at him twice, I don't know whether I hit him both times or not.

What did you shoot them with? .38 Detective Special. That's the gun you took us over to Haralson County to the church that we got this morning. Yes, same one.

What did you do when you shot both of them? Well,

I just got in the car, I was so tore up. I didn't know what to do. I backed out and I rode back up across the mountains up there and I went up to the church, got out, took the shells out, (3 empties and 3 live ones) and I threw them down across the woods, and I went out there to that tombstone and hid the gun. I left my car parked in the road so that the kids didn't see me where I had put the gun.

Who was in the car with you? My boy, Kenneth William Reeves, and Betty Ballew. And they were with you when you went to the house? Yes, but they didn't see anything cause I was inside the house when the shooting took place and they were sitting in my car, and they didn't know that I even went down there for that purpose. And I didn't have no intention for going there to kill neither one of them. I had went to take her the $70.00 to get her groceries with. In other words this is something that just; it just on the spur of the moment just come up. When you got there it just upset you so much? It just upset me so much till it was just more than I could take. Cause the idea of them being in that way and me a having to foot the bill and giving the house and everything and she was gonna marry this guy just as quick as our divorce went through. And I worked hard all my life to get what I had, to try to get ahead, and it was just more than I could take, at the time of it. Well, after you went down there and hid the gun behind that tombstone, what did ya'll do then? I drove right on back to the Quick Serve up here and that is where they picked me up at. Do you know what time it was they picked you up? No sir, I don't cause I didn't look at my watch. Ya'll didn't go anywhere else after you left the cemetery, just came back to town?

No sir, just came straight into town. I did drink the 2 or 3 more beers coming back in, I was so upset I really don't know which one, but it wasn't the six pack bought to start off with.

Well, did you tell Betty and your son what happened? I told them I had shot their mama. I told my boy that. What did he say about it Clarence? It just upset him a little bit at the time being cause I really didn't have time to talk to him much after that. He didn't have anything to say. Yea. Cause I didn't know whether at that time I had hit her hard enough to kill her or not.

Is there anything else that you can think of that you need to tell us or want to tell us? No sir, not that I know of. Where had you been staying Clarence since you left home? I've been staying with Lynn Pollard and his wife out at the Bentley's Trailer Park. We stayed at Miller's Trailer Park until they condemned them, part of them, and we had to move from there. So I've been staying out there with those people and working with Benefield out of town. In other words you have been staying with them ever since you and your wife have been separated? Right, all but the first 2 weeks I slept in the truck until it got too cold that I had to go somewhere or another to get out of it. Yea. Well, she put me out without anywhere or any place to stay at the time. I had to find some place to get in out of the cold. That's just all there was to it. Okay.

Okay, everything you have told us this morning has been free and voluntary on your part. Is that right? Yes sir, that's right. In other words you have cooperated with us the best that you knew how fully. Yes sir, sure did. And what you have told us is the truth?

Right, just exactly like it happened.

Clarence was there any conversation between you and your wife or else the other man that was in the house there, was there any conversation at all? No Sir. None at all? None at all. He broke to run out the door and I run, I went in the house. Where were they sitting when you went in? They were standing in the middle of the floor hugged up. Did you look through the window or door or what? Looked through the window. What was in that room, do you remember? I didn't see nothing, but just them, that was all I seen at the time. Then after that I just went blind with rage, I reckon. The only thing I knew was that she run backward toward the bedroom or something, there is a room back that way. And he broke to go out the door. And that pistol does that belong to you? Yes sir. Where did you buy it at? I bought it at Billy Croker's. How long have you had it? Oh I bought it somewhere around December. Okay Clarence if there is nothing else, we'll just conclude the interview. Alright.

This has been an interview with Clarence Reeves here at the Cedartown Police Department.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner

-V.-

THE STATE OF GEORGIA,

Respondent

SPECIAL SUPPLEMENTAL ADDENDUM TO

PETITIONER'S BRIEF

NOT TO BE PRINTED

THE ORIGINALS OF MANY OF THE PAGES OF THIS ADDENDUM WERE POORLY XEROXED COPIES. WHAT FOLLOWS IS UNFORTUNATELY THE ONLY AVAILABLE MATERIAL EVEN WHERE THE PAGES APPEAR TO HAVE BEEN CUT.

life sentences on cards

upon arrival at the Deputy Shieiff's home Bobbie Jean Salter was obviously dead as a result of a gun shot would through the neck severing the carotid artery and jugular vein. The Deputy Sheriff, after calling the Sheriff and undertaker, went to Lilly Spivey's house some three (3) hours later and upon arriving there and waiting about 15 minutes, the Defendant and Lilly Spivey drove up. The Deputy asked Defendant for the gun which Defendant produced from underneath the car seat. The Deputy advised Defendant of his Miranda rights, which Defendant said he understood and then asked Defendant, "do you want to talk to us?'. Defendant admitted shooting at the car.

1973 - 98 (1973) Affirmed MURDER cP 28486
MOTEN, JAMES TROUP

SUMMARY: Defendant, James Moten, was a participant in a plot to kill Dewindle Gates, the granddaughter of Frances Lay, to collect the proceeds of insurance on the victim's life. Defendant admitted participating in the murder and stated that he had choked the victim prior to her being shot and stabbed by Undell Lay and victim's uncle. In defendant's statement of June 20 to a police officer, he described the events leading to the murder of Dewindle Gates on June 10, 1973. Defendant said that he and Undell Lay drove the victim to a secluded area. When she attempted un, Appellant grabbed her and "choked her to the ground." Undell Lay shot the victim and stabbed her with a butcher knife. Defendant and Lay disposed of the body and the weapon at separate locations. The deceased body of the victim was found where they had left it.

2

CP

1973 - 99 (1972) Affirmed MURDER 28515
PEACOCK, CHARLES BIBB
SUMMARY: About noon on October 22, 1972, a group of young Bibb County residents, including the Defendant, went to a Jones County trailer park and attempted to buy drugs. They were unsuccessful, but agreed to try again that night. The group gathered together again that night, consisting of the defendant, Gary Sorells and James Salter, co-indictees, Danny Thurston, and Linda Carter. The defendant and Sorells wanted to get a gun to rob Gene Hall (with whom Spivey lived in a trailer) to get his drugs and amplifiers and to retrieve the appellant's guitar, previously left with "Rabbit" Spivey. Sorells obtained a gun from Murray McLean, and the defendant obtained a gun from his father's house. The defendant gave Sorells three of the six bullets his gun contained. The guns took the same sized bullets. Sorells fired one shot at a roadside sign as they drove along. They proceeded to a trailer park and picked up Spivey, who had a guitar with him. Spivey obtained three grams of drugs for the group and they went to a point near the river, after obtaining some water to use with the drugs. Salter, Spivey, the defendant, and Sorells went to the river where all used the needle. The last to do so was Salter. The defendant held his arm, while Spivey shot the drug in his arm. As Spivey pulled the needle from Salter's arm, a shot was fired and Spivey fell to the ground. Salter saw Sorells standing with a pistol in his hand, and saw him fire a second shot as Spivey was lying on his face on the ground. Salter saw the flash of three other shots fired off to his left. Other
- over -

1973 - 105 (1972) Affirmed MURDER CP 28594
WILLIAMS, JAMES EDWARD FULTON
SUMMARY: The Defendant, James Edward Williams, was with the victim when she was last seen alive on August 26, 1972. At approximately 4 A.M., on the morning of 27th of August, 1972 screams of a woman were heard and someone was heard pounding on the doors of 371 Gardner Street, Atlanta, Georgia. The victim was thrown to the floor on the front porch and the defendant stood over the victim and fired several shots from a revolver at the victim. The Defendant picked up a large foot tub fulled with dirt and flowers and smashed it on the dead girl's face. He then left the porch and returned with a cement block which he raised over his head and threw at the deceased; again, smashing her head. Defendant picked up flower pots and hurled them at the dead girl's face and bent down and started beating on the victim with his fists. Defendant dragged the dead girl's body off of the porch and into the side yard. The deceased body of the victim was found in the side yard with her face crushed beyond recognition.

1973-108 (1972) Affirmed MURDER Etc. CP 2863
FULLER, JOHNNY BIBB
SUMMARY: Note: This is a companion case to Perkins 28587 (1973 - 105). See factual summary therein.

1973 - 111 (1970) Affirmed MURDER CP 28643
WILLIAMS, RALPH MUSCOGEE
SUMMARY: In the afternoon of April 25, 1970, the defendant had engaged in an argument with the deceased over whether defendant had tried to take something out of the deceased's step-daughter's pocketbook. The two of them finally separated, shook hands and defendant left the premises of the bar where the argument had occurred. Approximately 15 to 25 minutes later, defendant returned to the bar-cafe and had a gun in his possession. (Defendant claimed he had the gun when he was in the cafe earlier, so did not leave to get it). As defendant entered the bar-cafe, the bartender, who was the stepson of the deceased, approached defendant and tried to talk to him. Defendant then backed out of the door and as he did the deceased came up from behind his step-son, the bartender, and was standing in the doorway when defendant shot him from about six feet away, outside the door. A witness for defendant testified the deceased had a beer bottle in one hand and a knife in the other hand and swung the bottle at defendant and another testified the deceased was cutting at defendant with the knife when defendant fired his gun and shot the deceased. In an unsworn statement defendant stated that "I will admit to one thing, of shooting a man on the ground of defending myself . . . I was only defending myself".

74-1 (1972) Affirmed MURDER (Domestic) 28668
JOHNSTON, LEWIS LAMAR

SUMMARY: On October 14, 1972, the appellant and his wife accompanied a ng-time friend, E. F. Martin, to the local fair and then afterwards to e V.F.W. Club. After spending a considerable amount of time at the V.F.W. ub, Martin volunteered to drive the appellant and his wife home. Martin stified at the trial that while the three were on their way home the ppellant struck his wife several times. When Martin threatened to stop the police station appellant fled from the vehicle into the night. s Johnston informed Martin that she had no desire to return home. Martin en drove her to a motel and registered under a false name. Appellant stified in an unsworn statement that he found his wife "buck naked" and t she admitted having intercourse with Martin. After finding his wife e appellant left the motel and took her home. Later that morning ppellant was seen beating his wife with sticks and was seen to "stomp her time or two" and then pick her up and carry her into the couple's house iller. Later in the day, appellant stopped by the sheriff's office and formed him that he had whipped his wife a little and was going to take to the hospital. The wife died on October 23, 1972, some 9 days after beating. Medical testimony attributed death to pneumonia induced from lengthy comotose state resulting from the beating. and renal failure duced by the beating. All three medical witnesses stated that death could e been caused by the injuries alone.

74-6 (1971) Affirmed MURDER CP 28718
RADLEY, JAMES TWIGGS

SUMMARY: On August 18, 1971 three couples met in a beer parlor in Macon where hey drank beer for a period of time, left the beer parlor in an automobile med and driven by the victim, stopped by the Bibb County jail to visit the other of one of the group and then proceeded to the home of the victim in wiggs County, Georgia, stopped on the way to obtain a case of beer. After rrival at the victims home, though most had been strangers to each other when hey met in the beer parlor, they more or less paired off in couples. The efendant persuaded his "date" to retire with him to the bedroom to satisfy is sexual desures, but the co-indictee was not so successful, nor was the ictim's date successful in her advances to the victim. Later, after more rinking, eating and dancing --when all of the beer had been consumed--the ictim made the mistake of opening his wallet and flashing a hundred dollar ill and a fifty dollar bill anddstating that his "friends" did not have to orry about food or drink. Shortly thereafter the defendant started hitting he victim on the head and demanding his money, the victim sought to run utside the house but the co-indictee hindered his escape and permitted the efendant to resume the attack. He again managed to escape but the defendant aught him, pushed him into some bushes, stabbed him and took his money. e died from such stab wounds. After arrest, the defendant admitted to the heriff of Twiggs County that he had killed the victim.

[Death penalty not applicable in this case --Furman applied-new stat not in]

1974-7 (1973) Affirmed MURDER (Domestic) 28721
QUINN, ROOSEVELT GILLIGAN

SUMMARY: The defendant lived with his wife and four children. His daughter, vone, had become pregnant, and on Saturday, the day before the shooting ccurred on Jan 14, 1973, defendant, his wife and Evona visited a hospital o allow Evona to be examined by a physician. During this trip, defendant as noticeably angry because of the cost of Evona's pregnancy examination and xpressed his ire both to Evona and his wife. On that evening, and continuing he following morning, defendant steadily indulged in alcoholic beverage so hat by Sunday afternoon he was described as "drunk" by police officers. At ome time on Sunday, defendant told his wife and Evona to "get out" of his ouse, and, in addition, told his son, Rickey, tha he was going "to kill Biddy (his wife) and Evona (daughter) before you come back again." That afternoon while his wife was cooking in the kitchen, and while Evona was packing her clothes in preparation for leaving the residence, defendant, using his own gun, shot and killed Evona. His wife testified that defendant first pulled the trigger and the gun did not fire, whereupon he again pulled the trigger, this time sending the fatal shot along its way. Defendant was in the bedroom when the incident occurred. After Evona was dead, defendant ran from the house crying, "I have shot my baby," -- Defendant admitted shooting his daughter, but maintained it was purely accidental and occurred while he was sitting at the kitchen table cleaning his gun.

[State did not insist on death penalty - issue not submitted to jury]

1974-9 (1973) Affirmed MURDER CP 28729
JOHNSON, RUFUS JAMES FULTON

SUMMARY: On Sunday, January 7, 1973, the day Harry Toney (the victim) died, Rufus James Johnson, defendant, and his co-defendant, Ronald Griggs, met at their apartment complex and decided to go get a drink together. Griggs apparently had only a few dollars but was buying. Defendant had no money, and he always wanted another drink. They went from one place to another buying drinks and smoking marijuana. Both were seen with a pistol during one drinking stop. Defendant testified that there was only one pistol, belonging to his co-defendant, and, thile he admitted carrying it that morning, he claimed that later the co-defendant "told me to give it to him."

About that time they were on their way to the apartment of Harry Toney, an apparently disabled man, who, according to a rumor which defendant had heard, had a small income from an insurance policy. The drinking companions arrived at Toney's and found him alive and well. They entered and during their stay, Toney was struck with a barbecue sauce bottle and shots were fired. Defendants left with a TV set and a radio, and immediately afterwards Toney's friends found his body. Each defendant said he went to Toney's with the other, that he was unaward of what was to transpire, that the other killed Toney, and that he only helped take out the loot on instructions from the companion. The barbecue saucebottle had the co-defendant's fingerprint upon it. Defendant subsequently made statements that "they had shot a man", "I just seen a man die" and "I just killed a man"

[Death penalty inapplicable - Furman -New statute not yet enacted]

CP

1974-15 (1973) Affirmed MURDER 28764
SMITH, RONALD DAVID FULTON

SUMMARY: James O. Clerk, Jimmy Pitts (the victim), a man named Holloway, and defendant met at a bar, did some drinking and then went to defendant's apartment to listen to records. After a while Appellant produced a gun and Pitts produced a knife. Defendant fired the gun through the door, tapped Clark in the head and then fired into the wall. At that point, Pitts took a dive at Defendant and Clark ran out the door passing Holloway on the way.

Gloria Dalton testified that she lived with Defendant and was there the night that Defendant brought, Pitts, Holloway and Clark to the apartment. Pitts was talking about how he could take anyone's life with a knife. Defendant got the shotgun and fired and it looked like it hit Pitt's leg. Then Pitts jumped toward Defendant and it looked like he was trying to cut him. Defendant then made Pitts leave and Defendant followed him up the streetwith the shotgun. After they had left she found Pitt's knife on the floor. She heard the shotgun go off and Defendant returned stating that he had to shoot Pitts. He then instructed her to get rid of James Clark's coat and Pitts' knife and then he left. Defendant testified to substantially the same facts as Gloria Dalton with the addition of what happened at the time of the actual shooting. He stated that he called to Pitts and on confronting him, Pitts had something shiny in his hand and came down with it and that is when he shot him.

Prosecution waived the death penalty
Strong psychiatric testimony

1974-17 (1973) Affirmed MURDER, Agg.Aslt CP 28769
WILSON, MELVIN Life 5 yrs FULTON

SUMMARY: The appellant was visiting at the home of a friend, William Eilend, on Friday, July 6, 1973, and remained there until the time of the homicide early in the morning on Sunday, July 8, 1973. The frequently drank alcoholic beferages during this period. On this friday evening, at about 8:00 or 8:30 Roszelle Hill, who had been intimately accquainted with Eilend, came to his home. Runette Martin came to Eilend's home with Roszella Hill, or soon thereafter. Roszella Hill had a pistol behind her back when she came into the room where the appellant and Eilend were, and she put the pistol in Eilend's face. The appellant immediately spun her around and disarmed her. She tried to get the pistol back from the appellant, but he would not give it to her. She came back the next day and again tried to get the pistol. The appellant would not give it to her, and she told him that she was going to get the man it belonged to and come back and get it. Late in the evening of July 17, Eilend returne to his home, after having been out for a while, and asked the appellant, telli him that he had seen two men in the neighborhood. The men were strangers, but Eilend had seen them talking with Runette Martin, which was the reason he thoug they were coming for the pistol. Appellant and Eilend went out of Eilend's house and walked about 50 to 75 yards to the place where the two men were standing, talking with Runette Martin. Appellant asked if they were looking for him. One man had his hand in his pocket and appellant told him twice to take it out. Someone took a step or two forward, and appellant shot Bennett, killing him. Elsby Byrd turned to run, and the appellant shot him in the face, wounding him.

CP

1974-18(1973)Affirmed MURDER 28711
FORD, JOSEPH ANDERSON FULTON

SUMMARY: On April 11, 1973, the defendant pawned his gun to obtain money to buy drugs, and bought the drugs from the deceased. Afterhe and the witness had tried to use the drugs and found that they were not good, the defendant "was mad about it" and said that he was going to get his money back. The defendant further said, "I am going to kill this nigger," but the witness did not think he meant it. The defendant went back to the service station and got his gun back which had been pawned. Another person came by in an automobile, and the defendant asked the man to tke them down to Auburn Avenue. They got in the automobile and rode down Auburn Avenue, where they saw the deceased. The defendant got out and told them to go around the block and come back for him. When they got back, thedefendant got in the automobile, and the witness asked himiif he got his money back. He said that he did not. Heltold her that he had the gun out to scare the deceased, that the deceased distracted his attention, then grabbed the gun, and it fired. The next day the defendant and the witness took the gun and sold it to a Mr. Bell.

The defendant in his statement related that he took the gun with him because he was scared, that his hand was in his pocked beside the pistol, that the deceased distracted his attention and then "swung" at him, that he pulled his gun out, they struggled, and the gun fired.

NOTE: State did not ask death penalty and judge instructed jury that life was maximum punishment.

1974-21(1972) Affirmed MURDER & Armd. Robbery 28786
STRONG, JERRY WAYNE FORSYTH

SUMMARY: This is a companion case to Conroy-28143-See Summary there 1973-55

1974-22 (1973) MURDER & Aggs Aslt. CP 28787
CARTER, RAYMOND C. JR. (Life) (7 yrs) HOUSTON

SUMMARY: On March 10, 1973, defendant picked up two teenaged boys, Dennis McInvale and John Scott Zellner, who were hitchhiking home from a skating rink in Warner Robins, Georgia; shortly thereafter he pulled out a pistol and fatally shot McInvale, who was sitting on the front seat; that he then shot Zellner, the back seat pasaenger, several times, wounding him; he then drove several miles out of town and dumped the body of McInvale down an embankment; back and he then drove back toward Warner Robins, stopped by the side of the road and dragged Zellner out there he left him on the shoulder of the road. Zellner swore that neither he nor McInvale made any threatening gestures toward the defendant before he began shooting; and after the shooting defendant stopped the car several times and at the third stop he checked his pulse and stabbed him and hit him in the head. Defendant claimed he thought he was being robbed, and he shot them and beat Zellner back with a gun.

NB: Death penalty not in effect on date of this offense.

MR CP

1974-23 (1966) MURDER 28796
HEWELL, ERNEST E. Life HALL

SUMMARY: After a conversation with the victim, John Howington, in the early afternoon hours of May 27, 1966, the Defendant left Howington's house. Shortly thereafter, Hewell returned to the deceased's residence; however, he was now carrying a shotgun, which neither the victim's son nor his wife had ever seen in the Defendant's possession or in the Defendant's room, which the Defendant had rented ~~throughthe~~ since the month of February 1966. After a further conversation with the victim, Hewell entered this upstairs room he had rented. At approximately 3:30 p.m. on May 27, 1966, the deceased's son and another relative, who were in the house, were startled by a shotgun blast from the room to which the Defendant had gone. Hewell, holding a shotgun, then descended the stairs and told the two that he had shot the deceased. The defendant, while in a police car, referred to deceasedIs son "Mr Pierce, if you'll let me out I'll get him, too." The victim was killed by a shotgun blast. In his unsworn statement, the Defendant related that on two occasions, prior to the day of the killing, the victim had struck him. Hewell claimed that on May 27, 1966, he was in the room when the deceased entered and displayed a knife. Hewell alleged that the victim advanced towards him and that he had to shoot in self-defende.

Death penalty not asked for ~~the~~ by the prosecution.

1974-24 (1973) MURDER (Domestic) CP 28797
SMITH, WILLIAM CLYDE Life HALL

SUMMARY: After marital problems, appellant's wife moved in with their daughter and son-in-law, and defendant moved to a smaller house nearby their former home, which was put up for sale. Defendant chases o ff potential buyers and also drank and had a foul temper. The family arranged to have defendant examined at the Georgia Mental Health Institute in Atlanta. The admitting physician conducted a 90-minute interview and decided to admit defendant for evaluation. He stayed in the hospital less than a week add returned home and instituted divorce proceedings against his wife. About three weeks later, Sept. 29, 1973, he shot his son-in-law when the defendant's wife, daughter and son-in-law came out to remove belongings from the old home. Testimony of witnesses and defendant presented several conflicts, e.g. whether there had been veiled threats of a whipping from the family, and whether the son-in-law dashed out the front door and struck defendant down before defendant left and returned with his shotgun. Considerable psychiatric testimony.

NB: State did not ask for death penalty.

MR

1974-28 (1973) Reversed MURDER 28871
HILL, ALICE ASKEW (Life) CARROLL

SUMMARY: At approximately 3:00 to 4:30 p.m.on March 30, 1973, three brothers, Dennic, Larry and Bobby Vaughn, and a friend, Lamar Taylor, were drinking beer and "pitching pennies" by a bridge on the side of a dirt road which connects the Hayes Mill road and the Bonner "black top" road near Carrolton. The Vaughn brothers testified that the appellant drove to their location from the direction of the "Black top" road. With her in the car were Lonnie Kidd and David Lee Askew, her brother. Appellant told Taylor and the Vaughn brothers that she was taking Kidd and Askew to meet two girls. She then drove up the dirt road and over a hill toward the Hayes Mill road. Some time later, the appellant returned alone from the direction of the Hayes Mill road and again stopped to talk with Taylor and the Vaughn brothers. Bobby Vaughn got into the car with her, and the two drove up to the top of the hill, turned around, and returned to the spot near the bridge. Hill Seaton, a local resident, testified that he turned onto the dirt road from the Hayes Mill road and saw one Gaines leaving the area. Gaines told him that a man was lying dead further up on the dirt road. After briefly inspecting the body, Seaton told Gaines to stay on the scene while he went to phone for help. Seaton then proceeded along the dirt road, over the hill, and approached the bridge where the appellant, the Vaughn brothers, and Taylor were located. He told then that a man was lying dead on the other side of the hill and that they were to stay where they were. He continued down the dirt road and called the sheriff. The appellant then drove again to the top of the hill, this time with Lamar Taylon in the car, turned around, and drove back past the bridge toward the "black top" road and into Carrollton.

contd

contd.
e victim, a cab driver, had been shot and beaten to death following or in
e course of a robbery. Appellant was accessory.

Reversed because statement of accomplice admitted in evidence.

74-29 (1973) Affirmed MURDER CP 28874
IN, GERALD LAMAR (Life) FULTON
MARY: On February 18, 1973, shortly before 7:00 p.m., Defendant fatally
ot Rosa Hogan. Defendant was a friend of the victim, and had entered her
sidence with her approval sometime earlier in the afternoon prior to the
oting. The victim's ten-year-old daughter, Brenda Ann, told the court that
fendant had told her mother that he would take her to the west end of Atlanta
she would clean up her house. This was followed by Defendant's leaving the
ctim's house to go to a Jack's house. Defnndant returned to the victim's
use shortly thereafter and followed the victim around her house as she worked
til Defendant, the victim and her three children got into the kitchen. Very
tle conversation transpired between Defendant and the victim following
fendant's return from Jack's house; nor was there any argument. It was in the
ctim's kitchen, in front of her three small children that Defendant, while
e victim had her back to Defendant, removed a gun and inflicted a wound which
ntually led to her death shortly thereafter. Following the shooting,
fendant asked Rosa Hogan if he had shot her, and seeing that he had he then
ced her in his truck to take her to the hospital. She died at the hospital.

: No valid death penalty statute in effect on this date of this offense.

CP

74-34 (1973) MURDER 28918
INES, ROBERT ALLEN (Life) SUMTER
lias) Wallace, William James
MARY: The testimony of two eyewitnesses, Herschel Neely (or McNeely) and
mes Battle, showed that at approximately 2:50 a.m. on August 10, 1973, the
efendant and the victim Samael Merritt had a brief conversation on a street
orner outside a cafe in Americus, Georgia; that theappellant left and Merritt
as joined by Neely and Battle; that shortly thereafter the defendant walked
ack down the street and joined this group; that after a brief exchange with
erritt, the defendant pulled a gun from his belt and shot him in the chest;
nd that there had been no words or fighting between the two men prior to the
hooting. Eddie McGrady, a security officer, testified that he was sitting
n his office close to where the shooting occurred and heard the shot; that he
mmediately opened his door and saw Merritt run by and fall to the ground
pproximately 15 feet away; that he saw the defendant and ordered him to halt,
ut he ran up the street; that he fired a warning shot in the air but the
efendant kept on running and turned into the yard of Clarence Smith; that
fter going back and ascertaining that the police and an ambulance had been
alled for the victim he went to Clarence Smith's home; and that the defendant
surrendered himself to him there and he then turned him over to Officer Hayes
of the Americas Police Department. Officer Hayes, with permission, searched
Clarence Smith's house and found a pistol, subsequently idenfified and
introduced in evidence, under a couch in the carport with which was loaded with
three live rounds and a spent shell.

CP

1974-35 (1973) MURDER (2) & Agg. Aslt. 28920
McHAN, ALBERT E. (Life) (5Yrs) WHITFIELD
SUMMARY: On Sunday, February 11, 1973, Appellant sought out Billy Cross (age26)
and asked him for assistance in moving Appellant's trailer. Billy's two
brothers, Larry age 19, and Michael, age 16, decided to go with them. They
went to Appellantls trailer where the three Cross boys sat down on a couch.
The Appellant locked the door, and on the pretense of getting something to
drink drew a gun from a cabinet drawer. Appellant then asked Billy Cross
concerning the whereabouts of Appellant's wife who had left him two weeks
earlier. Billy Cross stated that he had no idea as to where Appellant's wife
was, to which, Appellant's reply was that, ". . . I was either brave or
crazy one. . ." Appellant shot Billy Cross twice, then shot Michael Cross
killing him. and in the ensuing struggle for the gun he shot Larry Cross and
killed him.

NB: Death penalty not effective on date of this offense.

CP

1974-36 (1972) MURDER (3) 28927
HULSEY, JERRY WADE Life WHITFIELD

SUMMARY: In the wening hours of June 24, 1972, and the early morning hours of June 25, 1972, several young people were gathered at the trailer-home of Jimmy Large and his half brothers, Bobby, Jerry, and Johnny Nichols in Whitfield County. Present were Large and his half brothers, Bobby and Jerry Nichols, Loretta Hedden, Lynnette Duersel, and Steve McClure and his sister, Sherri. The group was sitting around the trailer listening to music and talking. Near the midnight hour the defendant, Jerry Wade Hulsey, arrived. Hulsey knew most of those present in that he oftentimes frequented the trailer-home of Large and the Nichols brothers. Although the late June evening was rather warm, Hulsey arrived wearing a jacket. The jacket concealed a .45 caliber automatic pistol. Hulsey kept his jacket on, consumed a glass of water, retired to the bathroom for a short period, and returned to gun down most of those gathered in the trailer. Hulsey fired twice at Jimmy Large, hitting him in the chest. Steve McClure was then shot in the chest. Bobby Nichols was next fired upon by Hulsey but Hulsey's aim was wide. Loretta Hedden was then hit by Hulsey's next shot. Sherri McClure was fired upon next, again, receiving a wound in the chest. Finally, Jerry Nichols was hit in the back as he attempted to flee. Jimmy Large, 18 year old Steve McClure, and 16 year old Sherri McClure died as a result of the chest wounds suffered by them at the hands of Jerry Wade Hulsey.

NB: Death penalty statute ineffective on date of this trial-Furman

Lots of psychiatric testimony.

1974-38 (1973) MURDER & Armd. Rob. CP 28953
EADES, Larry (Life) (Life) FULTON

SUMMARY: The A& P Food Market located at Edgewood Avenue at Bell Street, Atlanta, Georgia, Fulton County, was robbed on February 9, 1973. During that robbery, Mr. Harold Martin, the manager, was killed by one of the Perpetrators The State called to the stand Tommy Davis, a co-defendant of the appellant, who testified that he, the appellant, John Fallings and James Clark, agreed among themselves to rob the aforementioned A & P Market. That on Februgry 9, 1973, Davis procured a gun and met with the appellant, John Fallings and James Clark. That all of the aforementioned had guns and they drove together to the A & P Market. Davis testified that prior to arriving at the market, al discussed committing the robbery; and, that Fallings suggested robbing that particular market. It was agreed that the appellant and Fallings would go into the market to commit the robbery while Clark positioned himself as a lookout and while Davis remained in the getaway car. Davis testified that after the robbery and while he and his comparions were making their getaway, the appellant stated that during the robbery, Fallings' gun went off while Fallings pistol-whipped the manager.

NB: Georgia death penalty statute not in effect on date of this offense,

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MR

1974-39 (1973) MURDER 28954
JORDAN, JACK FULTON

SUMMARY: On Aug. 26, 1973, the defendant and his wife, Jacqueline, and Henrietta Weaver and James Bell, the deceased(who lived in apartment with Henrietta came back to Henrietta's apartmen t from a "political" party at about 2:00 a.m. The defendant and the deceased went out together. After they came back, the deceased went to bed. Henrietta, talking with defendant and his wife, stated that the daughter of the deceased had gotten fat. The deceased jumped up and said, "What you talking about my child for?" The deceased started cursing and went at Henrietta with a knife and a bar stool. The defendant told his wife and Henrietta to go out on the porch, that he would "cool him down." They went outside, and heard tussling and some glass. They took a taxi away from the scene. Defendant went home and got a gun and went back and shot the deceased. He alleges that the deceased kept coming at him and in one version of his testimony states deceased had a knife. He remained at the scene until the police arrived.

Note: Judge instructed that Life was the only legal sentence.

CP

1974-43 MURDER ARMED ROBBERY 29015
WEST, WILLIE C. Jr. (Life) (Life) BURKE

SUMMARY: Allen DeLoach was killed on January 20, 1973. An accomplice of the defendant, John Junior Williams,testified that on the day of the murder he borrowed a gun, identified as a "Clerk First" 32 caliber pistol, from John White. About 7:15 that evening he had a conversation with appellant and one Jackson at which appellant and Jackson agreed to "get" DeLoach, and williams agreed to pick them up afterwards. Appellant and Jackson left, and Williams waited ten or fifteen minutes and drove past the Red and White Supermarket, which was operated by DeLoach. He parked his car and walked toward the store. At that time he saw ~~Deloachk~~ DeLoach lock the door to his store, walk to his truck, open the door to the truck, and place something inside. DeLoach then turned and began to urinate. Jackson approached DeLoach and Williams heard a shot, saw Jackson run, and heard two more shots. DeLoach ran toward Jackson after the shots were fired. Williams testified that he saw the appellant in the parking lot during this period of time. Williams returned to his car, drove a couple of blocks, and picked up Jackson and appellant. They asked to go to the "Stag Club," but ~~the~~ they changed their minds and were left at the "Wash House." Williams went home; fifteen or twenty minutes later, he was driving in the vicinity and was stopped by appellant who gave him $20.00 "for your trouble."

Note: Death Penalty Statute not in effect on date of this offense.

1974-44 MURDER (Domestic) CP XXXXX 29030
BONDS, CURTIS (Life) HALL
SUMMARY: Curtis Ray Bonds , the defendant, and his £ wife,Ella Mae Bonds, had been separated for several months. He went to the home where she and thei four sons lived about 2:00 a.m. on January 27, 1974. The victimxxxxxxxxx his wife, awakened the children and told them their father xhad had come to see them. After they had seen their father the children went back to bed. The defendant w as drinking vodka. When the children woke up later in the morning the defendant was still in the living room talking with the victim. The victim tried to get the defendant to leave the house and "sleep it off". The victim sent one of the children to her daughter's home to ask them to come there. The defendant asked the victim if she had ever seen a "full blooded murder." The defendant had a shotgun with him which he had brought xhxx their son. He pointed the gun at the victim and she told him to leave and kept pushing the gun away trying to keep him from shooting her. She succeeded in pushing him out the door and then broke away and ran back into the house. He shot her in the back of the head when she was about to step inside the door. The defendant went back into the house and told the children that he had shot their "old xxxx lady." He pointed the gun at them and they asked him not to shoot them. The homicide occurred in the presence of three of the children who testified in this case. After the defendant was arrested the xxxx sister of the victim asked him why he had killed her. He stated that she and her brother were next. The defendant testified that he did not know the gun was loaded and that after a brief struggle for the gun with the dictim he slipped and feal and that it accidentally fired and hit her in the back of the head.

1974-49 MURDER CP 29080
TUCKER, DIXIE (life) FULTON
SUMMARY: On Oct. 9, 1973, appellant shot the deceased twice with a pistol while they were in a grocery store. There was no provocation for the homicide apparent to the witnesses. The appellant stated to a store employee, who detained hi m until the officers arrived, that the deceased had been mistreatixng him. The evidence showed that the deceased and the appellant both had lived in a public housing project for low income elderly persons.

974-52 (1960) MURDER 29084
AILEY, JOHN WESLEY (life) NEWTON
UMMARY: This is the fourth appeal from Bailey's 1960 conviction for urder of his father in law on Jan. 16, 1960.

o trial report prepared by DAY because it is too far out of the time rame.

974-54 (1973) MURDER CP 29096
ILTON, JOHN ROBERT (life) FULTON
JMMARY: In the early morning hours of August 24, 1973, Bradley Couch was ordered by Appellant after a brief altercation occurring outside of an tlanta nightclub. The deceased and two other companions had come to Atlanta £ rom Peachtree City shortly after midnight when the bar thatx they were in had losed. The deceased and his two companions left the Atlanta bar somewhere etween 3:30 a.m. and 4:00 a.m., after they and the other patrons had been otified the bar xw was about ready to close. As they left they noticed two en standing by a motorcycle which was parked directly at the foot of the steps eading from this nightclud. Just before the victim and his two friends pproached their automobile in the parking lot, a rock struck their car. xAxh he deceased and one of his friends looked around to see if they could find here this rock had come from, and as they did they noticed that the two men ho had been standing by the motorcycle which they had previously passed ere approaching in their direction. These two men then asked the victim x nd his companions whether xx or not they had xxx thrown a rock at their otorcycle. An argument ensued that resulted in an altercation. The ictim's friends allege that Appellant cut at the deceased with a razor box nd appellant claiming the victim cut him with a knife. Appellant turned and an into the nightclub. The deceased and his companions then proceeded to nlock their automobile so that they could leave. The Appellant came out of he nightclub, approached them unleashing a barrage of obscenities at the eceased, produced a gun and fired it at the deceased. Appellant then turned nd got on a motorcycle and left the parking lot. The victim died of unshot wound.

974-61 (1973) MURDER CP 29143
IGH, RALPH (life) FULTON
UMMARY: In the early evening hours of June 25, 1973, Robert Lee Foster left ome for work. Robert Foster, 28 years old, was mentally retarded and for everal hours each evening did cleaning chores xx at the Scoggins Package tore in East Point. Foster carried a small caliber pistol during his evening hores at Scoggins. The appellant, Ralph High, from the same East Point eighborhood, had known Foster and his mother for many years. Later in the vening of June 25, Foster was accosted by the pis tol-wielding High. In an xxxxxxxxxxx effort to support his heroin addiction, High fired a randum hot, hoping to frighten Foster into parting with some of his money. AS Foster urned in response to the shot, High saw that Foster also had a pistol, became rightened himself, and fired another shot at Foster, hitting him in the chest.
High fled from the scene. Foster was dead on arrival at a local hospital. eath was caused by the gunshot wound to the chest inflicted upon Foster by ligh.

CP

1974-62 (1973) MURDER Agg Aslt Rob by Force 29154
BROWN, Johnny Leroy, et al (Life) (10 yrs) (20 yrs) CHATHAM
(et all is Brown Bobby Leroy age 30)

SUMMARY: These offenses occurred August 3, 1973. The evidence shows dhat Wyomie Pryor had known the defendant brothers for a long time and had lived with Bobby Leroy Brown for several months. She and the brothers went to a certain house in Frogtown and she bought a half-pint of whiskey for them. The victims, Allen Givens and James Stevens (alias Cornbread) arrived at the house later. Johnny Leroy Brown heard Cornbread mention something about money The defendants and Wyomie left the house and waited outside for the victims tc leave. When the victims left, Johnnie Leroy Brown attacked Givens with a knif while Bobby Leroy Brown attacked Stevens with a large concrete block. The defendants then went through the victims' pockets taking an unknown amount of change from Givens and the victims were then dragged into the bushes. During the attack Wyomie testified that she tried to get the defendants to stc but that they ignored her. After the attack she stated that she did not call for help for the victims because someone else had already called. Other evidence was introduced which showed the scene of the crime, the wounds inflicted on Givens and Stevens, and the condition of Givens' clothing which was the same as the testimony given by Wyomie. A statement of ~~Johnnie~~ Johnnie Leroy Brown was also introduced into evidence which contained an admission that he inflicted some blows on one of the victims. James Stevens died from his injuries.

MR

1974-63 (1973) MURDER 29179
WILSON, HARRIS (Life) CLINCH

SUMMARY: Appellant w as having domestic problems with his wife during the weeks preceding the homicide, and found her at the home of the victim on at least two ~~occasions~~ occasions. On one such occasion, he found her in~~a~~ a partially undressed state. On the day of the killing, July 3, 1973, appellant went to the home of the victim in search of his wife. Unknown to appellant, his wife was secreted behind the house. Heated words were exchanged, and appellant drove away, followed by the victim. About a mile down the road the vehicles were stopped at which time appellant delivered a fatal wound to the victim with a pocket knife. The only eye witness for the state testified that he w as at the victim's home during the verbal exchanges. The witness stated that appellant ~~had~~ challenged the victim to a physical confrontation to take place at Kings Creek, about a mile down the road from the victim's house. Appellant ~~had~~ departed in his truck and the victim followed in his own truck. The witness waited a minut4 or more and followed, coming upon the two trucks, now parked on opposite shoulders of the road a mile or so down the ~~xhx~~ road. At that point he saw appellant leave his own truck, approach the victim's truck, open the door, make two or three thrusting motions with his ar close the door, run to his own truck, and drive away from the scene. The witness approached the victim's truck and was asked to drive him to the hospit While moving the victim to the passenger side df the vehic le, the witness saw a cut on the victim's chest. The witness testified that he did not see either the appellant or the victim with a knife, and from his view point, was

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ble to see the hands of the victim when the knifing took place; he never the victim leave his truck. A nurse at the hospital found a closed pocke ife in one of the victim's pockets. Appellant's testimony may be marized as follows: The victim issued a verbal challenge to fight, reupon appellant left the house. The victim pursued. Both trucks stopped both men got out of their trucks. Upon seeing that the victim was amed h a knife, he drew his own knife. The victim made the first threatening tures, and in the ensuing scuffle appellant swung at the victim, but did t know if he wounded him. He returned to his truck and ~~left~~ left the ne.

1974-68 (1972) MURDER 292
BAITIE, Bobby Lee (life) CP RIC
SUMMARY: On Aug. 21, 1972 the defendant's wife was visiting in her mother's home in Augusta, Georgia. The defendant was there. The mother i law testified defendant chased her out of the house with a pistol, hit her daughter in the head and while she was next door calling the police she hea a shot fired. Her daughter was killed by a gunshot wound in the left temple Defendant claimed he was handing the gun to his wife to put up when ~~it~~ it fired.

Note: Death Penalty ~~statute~~ statute not in effect on date of this offense.

THOMAS, GEORGE JR. (Life) (20 yrs) CHATHAM

SUMMARY: The appellant, George Thomse, Jr., Rufus Busby, and Stanley Stubbs began the summer of 1973 as roommates. The trio shared a house rented by Stubbs in Savannah near Savannah State College. Busby was a college student but was working during the summer months. Stubbs was also a college student and attended Savannah State College for two quarters. Near the noon hour on June 28, 1973, Rufus Busby came home from his nearby job for lunch. Thomas was at home and asked Busby if a nearby store, the B. J. James' Confectionery, was open. Stubbs asks also came home for lunch but soon returned to Savannah State College for an afternoon class. When Stubbs returned home shortly afsxxxafsx after 2:00 p.m. he found a knife sticking in the door to his bedroom. Thomas admitted sticking the knife in the door.

Shortly thereafter, Thomas, aware that checks were regularly cashed at the confectionery, took the knife from Stubbs' door, donned a mask, and proceeded to the confectionery where he demanded of the proprietor, 68 year old B.J. James, "Give it up." James indicated where he kept his cash and when Thomas reached for the money, James attempted to foil the robbery, striking Thomas in the forehead and grabbing hxs his mask. When struck by the elderly James, Thomas began slashing and stabbing him with his knife. Thomas inflicted sixteen stab wounds on James, ran from the store with $68.00 obtained from the cash drawer, and disposed of xhxd the mask and knife. James died as a result of multiple stab wounds, including one that performted his heart, inflicted upon him by Thomas.

1974-73 (1974) MURDER CP (Domestic) 29312
BROWN, THURSTON EUGENE (Life) BIBB

SUMMARY: On January 21st, 1974, about 9:00 p.m., Betty Hayes was found in the hallway of her apartment house. She had been shot several times in the back and arm and was pronounced dead by the coroner at the scene. Appellant stated they were engaged in a domestic argument about money he spent for his food and she went to get a gun from out of the bed and it fired and he got it away from her and fired some more hitting her. She appears to have been his common law wife.

1974-75 (1974) MURDER Aggd Aslt. MR 29314
PACE, CHARLES EDWARD (life) (10 yrs) MUSCOGEE

SUMMARY: At approximately 1:45 a.m. on April 28, 1974, David Jones, Johnny Mitchell, and Eddie Carter were in a 1966 Buick automobile owned and driven by Milton Jones. They were proceeding south on Victory Drive in Columbus, Muscog County, Georgia. Their intended destination was the Krystal restaurant, but they saw that it was crowded and made a "U" turn proceeding back in a northerly direction toward Columbus. After making the "U" turn, a blue Oldsmobile passed their car at a high rate of speed. It then swervedx to a stop to the right of the highway some distance in front of them in front of a restaurant called the Beef Housex House. The trunk of this car flew open, a man exited from the car, took a gun from the trunk, and fired several shots at the car in which the victims were riding. Eddie Carter, Jr. was struck in the head by a shot and this caused his death on May 2, 1974. Milton Jones was struck hxr by a shot in the head and hand. Milton Jones and David Jones each identified Pace as the man who fired the shots.

1974-79 (1974) MURDER MR 'Domestic' 29331
PROVEAUX, CARL (life) COLUMBIA

SUMMARY: The trial evidence showed that the child, the ten-month-old son of the defendant's girl friend died on Feb. 13, 1974, from injuries received while in the defendant's care. Proveaux admitted to an investigator that he had abused the child on previous occasions, but maintained to the investigator and at xrx trial that he had been changing its diaper and when he lfet the room for a moment it had fallen from the sofa onto txx the floor. He testified that it was gasping for breath, and he slapped it a few times to revive it, and then attempted to administer heart massage. The txstimony of the director of the State Crime Laboratory, who conducted the autopsy, was that he wsxx found extensive external and visible injuries to the child, including teeth marks on both arms, and extensive internal injuries which were inconsistent with a fall from a sofa and with heart massage but were consistent with a blow or blows to the body. The evidence tended to show multiple impacts to the abdominal cavity, as well as hemorrhages of the liver surface and of the tissues below the pancreas. The cause of death was a rupture in the heart, and his opinion was that such a rupture was consistent with a very hard, localized blow; and totally inconsistent with a fall from a sofa xxx or heart massage.

1974-80 (1973) MURDER (Domestic) CP 29338
SIMMONS, JOE G. (life) OGLETHORPE

SUMMARY: Barbara Simmons, the victim, (the dxvorced for mer wife of the defendant, had arranged to meet one Walt McCannon in a wooded area on the afternoon of October 10, 1973. McCannon arrived in his truck, accompanied by three Negro xx employees to whom he was giving rides home. He testified that he saw Mrs. Simmons in her automobile, a 1970 Mercury, and leaving his employees to wait for hxm he joined her. A few moments later, hearing a suspicious noise, he checked the rear of the automobile, saw that the trunk lid was slightly open, and, opening it further, he saw a flash and "a wallowing motion" at which point he ran away into the woods. He heard a scream and a shot, but continued running about a mile to a house from which he telephoned the sheriff. He told the sheriff he had seen a gun barrel protruding from the trunk, held by white gxoved hands. The sheriff pxx proceeded to the area but found neither the ruck nor the Mercury. The testimony of the three Negro employees was that while they were xxxtxxng waiting for McCannon's return Simmons came up carrying a rifle and wearing white gloves, and embarked upon a course of terrdorizing the three men over a period of some hours, compelling them to assist him in moving and damaging the truck, and moving the Mercury. He threatened their lives if they failed to cooperate. Finally Simmons, still accompanied by the three Negro men but now driving a third vehicle, picked up his two sons at school and in their presence dropped the three men off with $2.00 apiece bo buy liquor and a threat to kill them if they told the law enforcement officers of his recent activities.

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Simmons' son Joey, 14 years old, corroborated the testimony concerning Simmons' remarks while putting the three men out of the truck; and testified that his father brought his rifle out of the vehicle into the house, and that dix later that night he had heard his father praying, asking God's "forgiveness for what he'd done."

On the following day, October 11, McCannon found his damaged truck in in the woods, and the three employees led authorities to the place where the Mercury had been left. It had suffered gunshot damage to the trunk lid. Mrs. Simmons' body, with a gunshot wound, was discovered in the woods the nex day, October 12, hidden beneath an automobile floor mat and a pile of brush.

1974-81 (1973) MURDER CP 29343
JACKSON, CLARENCE (life) LOWNDES

SUMMARY : On May 21, 1973, the defendant and the victim were involved in an argument on the street outside of a bar. The defendant pulled a pistol on the victim and threatened to kill him. The victim left and reported the incident to the police. Several hours later the victim was inside the bar when the defendant entered. As the victim walked toward the front door, the defendant followed, confronted him and began firing his pistol. The defendant fatally wounded the victim and hit the victim's friend in the thigh. A pistol belonging to the victim containing four spent shells and one live shell was found on the floor next to his body.

Barroom Shooting following Argument

1974-82 (1974) MURDER CP 29345
ANDERSON, ALFRED (Life) LOWNDES

SUMMARY: On the afternoon of January 4, 1974, the defendant left his shotgun with a neighbor. Later that evening he returned to retrieve his gun, convers ed w ith his neighbor and another witness, then began to leave from the neighbor's back porch. At this time the victim arrived and commented to the defendant with regard to the manner in which he was carrying the shotgun within the city limits. The defendant threatened to kill the victim, then almost immediately discharged the shotgun. The shotgun blast killed the victim.

The defendant stated that after he had warned the victim to stay away from him, the victim continued toward him with a knife and he had no choice but to shoot. No knife was found at the scene and both eyewitnesses testified that they did not see a knife in the victim's possession.

1974-86 1973 MURDER CP 29378
BARKER, W.A. (Life) BIBB

SUMMARY: On September 23, 1973, the defendant and two companions, Mercer and Livingston, had been drinking at a drive-in. The defendant displayed a pump shot gun to a witness and suggested they go "get a nigger." He and his companions then drove around in Mercer's car until about midnight. At that time the victim and his companion, Stephens, were in Stephens car and first saw the defendant and his companions stopped at a red light. After s topping at red lights at two more intersections, words were exchanged between the occupants of the two cars. Stephens then drove at a high speed and was chased by Mercer. When Stephens arrived in front of the victim's home, he and the victim jumped out of the car, apparently leaving the keys in the ignition, and ran to the house. The defendant and his companions jumped out of their car. Mercer shouted "Halt" and fired a shotgun blast into the porch roof. He then fired a second blast which fatally wounded the victim. Mercer then drove off with the defendant and Livingston.

1974-91 (1974) MURDER (Life) CP (Domestic) 29389
ABNER, ROSS JACKSON OGELTHORPE

SUMMARY: On January 13, 1974, the defendant was drinking beer and watching television with a companion in the defendant's home. The defendant and the victim, the defendant's wife, argued over the defendant's consumption of the beer. After the defendant slapped the victim, the victim called her sister to request assistance in leaving the house. The defendant then took a shotgun from a gun rack on the wall, pointed the gun at the victim, and fired the gun, killing the victim. The victim's 23-year-old son by a previous marriage witnessed the incident. The son told the defendant to call an ambulance; however, when the defendant was unable to communicate with the telephone operator, the son requested the ambulance.

The defendant testified that the gun was discharged accidently when the victim grabbed it, and that he did not know that the gun was loaded. The defendant denied that he was intoxicated at the time of this incident.

The prosecutor waived the death penalty.

1974-101 MURDER (Life) CP 29434
SCOTT, JAMES MADISON

SUMMARY: On November 10, 1871, the victim, a route man for a beer distributor, offered to give his helper a ride home. The victim was carrying the day's receipts which included over $700.00 in cash. After dropping his helper off, he was met on a country road by the defendant and a co-accused who was a former helper who had been discharged a week prior to the offense. The defendant shot the victim four times and took the cash from him. He was left dying in his automobile. The defendant and co-accused had borrowed the automobile and pistol they used about two hours prior to the crime.

HABEAS CORPUS CASE

See 1972-59 (1971)
SCOTT, JAMES
Case No. 27443
230 Ga. 47 (1973)

974-105 (1972) MURDER (Life) (Domestic) CP 29478
ICHOLS, LONNIE TILLMAN FORSYTH

UMMARY : On November 11, 1972, the defendant and his wife, the victim, ere arguing in their home. The defendant pushed the victim down on the ouch several times with his hand and asked her if she were afraid to die. e then fatally wounded her with a shot from a shotgun.

In an unsworn statement the defendant admitted that he had been drinking nd that he had killed his wife; however, he maintained that the killing as an accident.

EATH PENALTY NOT IN EFFECT

1974-109 (1974) MURDER (Life) CP 29505
BROOKS, BOBBY FORSYTH

SUMMARY: On July 19, 1973, at about 3:00 pm the victim, a 78-year-old man, rode with the defendant to a local grocery store to purchase some items. The victim's body was found the next day with 3 or 4 puncture wounds in a c reek underneath a bridge. The victim generally carried $70 or $80 with him.

On the same day the defendant visited a friend around 6:30 pm. He told the friend that he had about $70 or $80 but needed more to take a trip. About 9 pm the defendant visited his brother-in-law; he later visited his sister-in-law; he then returned to his brother-in-law's to spend the night. The next morning the defendant told his brother-in-law that he had pushed a man off a bridge and that he thought he might have killed him.

The defendant testified that after he and the victim left the grocery store, they went to a beer store . The defendant saw the victim leave the beer store with several other men and did not see the victim again.

CIRCUMSTANTIAL EVIDENCE CASE - NO DEATH SENTENCE SOUGHT

CP

974-111 (1974) MURDER & 2 pistol misdemeanors 29525
COATS, HOWARD JR. (Life) (12 mos. each) FULTON

SUMMARY: On July 8, 1974, the victim and a friend were in a bar when the defendant and two companions entered. The defendant and the victim argued. The defendant went outside and returned. The victim went outside and returned. The defendant and the victim argued again, then the defendant shot the victim, fatally wounding him. The victim's gun was found by his body.

The defendant stated that he shot the victim in self defense.

CIRCUMSTANTIAL EVIDENCE CASE - DEATH SENTENCE NOT SOUGHT

1974-113 (1974) Rev'd 1975 MURDER CP 29530
EDWARDS, JAMES (Life) FULTON

SUMMARY: On December 23, 1973, the defendant visited a friend's apartment. The victim arrived later. The defendant and the victim argued about a coat which the defendant had pawned to the victim. The defendant then shop the victim with a pistol, fatally wounding him. The defendant then dragged the victim across the floor, slammed the victim's head on the floor, and took some money and the coat from the victim.

The defendant stated that his pistol had fired accidently.

N.B. Rev'd: Error in jury charge on felony murder rule; court failed to recharge jury on their request as to definition of murder and manslaughter.

CP

1974-116 Rev'd 1975 MURDER (1974) 29555
FAVORS, JOE (Life) COBB

SUMMARY: On November 16, 1973, the defendant and two companions went to his cousins' apartment. After about 5 or 10 minutes they left. The victim arrived at the same apartment some time later. When the defendant returned to the apartment, he drew a .38 caliber revolver, pointed it at the victim, and fired the pistol. The bullet entered the victim's head, fatally wounding him.

The defendant stated that he did not know that the gun was loaded and that the shooting was an accident.

STATE WAIVED DEATH SENTENCE

N.B. Rev'd: First offender record of witness erroneously excluded; Request for jury to be polled erroneously denied.

1974-117 (1974) MURDER CP 29557
DAVIS, OLIVER (Life) BROOKS

SUMMARY : The 15-year-old defendant and the victim did not get along well. On the evening of March 23, 1974, the defendant threatened the victim. Nevertheless on March 24, 1974, the victim visited the defendant's residence. The defendant took his grandfather's rifle from its rack, pointed it at the victim, and fired the rifle, causing the victim's death. The defendant later confessed to his grandfather that he had shot the victim.

PROSECUTOR WAIVED DEATH SENTENCE

1974-118 (1973) MURDER (2 counts) & Armed Robbery 29558
CODE, WILLIE JR. (Life - 2 counts) (10 yrs.) BIBB

SUMMARY: On March 27, 1973, two employees of a package store were killed by shotgun blasts. The circumstances at the scene indicated that a robbery had taken place. The witness who discovered the incident noticed a Volkswagen leaving the store. Another witness identified the defendant in a lineup as the man he had seen in a Volkswagen near the package store. This witness had seen the defendant get out of the car,&put liquor bottles and a rifle or shotgun in the trunk of the car.

The police seized a shotgun which had been recently fired, several liquor bottles, and $25.00 from the defendant's residence. After the defendant was informed by the police that this evidence had been similar to that taken in the robbery, and that the defendant's alibi had been refuted, the defendant admitted that he committed the robbery and the shootings and showed the police the location of the rest of the stolen money.

DEATH PENALTY NOT IN EFFECT

1974-122 (1974) MURDER (Domestic) CP 29580
FREEMAN, ROBERT (Life) LOWNDES

SUMMARY: On the evening of January 19, 1973, the defendant went to the home of the victim, his estranged wife, and their 5 children. Neither the victim nor the children were at home. Soon after their arrival around 4:00 AM on January 20, 1973, the defendant kicked in the back door of the house and entered with a shotgun in his hands. After threatening to kill everyone in the house, he shot the victim in the abdomen.

The defendant stated that his wife grabbed the barrel of the gun causing his thumbs to hit the hammer and the trigger so that the gun went off.

The victim died on September 20, 1973, after an operation in connection with her shooting injuries.

PROSECUTOR WAIVED DEATH SENTENCE.

1974-123 (1974) MURDER CP 29586
JONES, ROBERT LEE (Life) FULTON

SUMMARY: On June 1, 1974, the victim, who had agreed to repair the defendant's car, was asleep in his room in a rooming house. The defendant was let into the rooming house, cursed loudly, waking up the victim, and entered the victim's room. The defendant asked the victim where his (the defendant's) car was; the victim responded that he could have the car if he paid him $58.00. The defendant then shot the victim with a shotgun, fatally wounding him.

The police officer who arrested the defendant stated that he heard the defendant mumble he had just shot a man.

The defendant stated that he shot the victim in self-defense.

Judge imposed life sentence with no mention to jury of death sentence.

1974-124 (1974) MURDER CP 29587
SPENCE, DAVID OMER (Life) PAULDING

SUMMARY: On March 17, 1974, the defendant was working at a truck stop when the victim, more than legally drunk, and some friends entered. The victim threatened the defendant, the victim and the defendant exchanged words, then the defendant requested that the victim and his friends leave. Outside, the victim came toward the defendant, the defendant retreated, & the defendant pulled out his gun and shot it once in the air. The defendant then requested help from the police on the telephone. The victim's friends forced him into the car, but the victim got out and ran toward the defendant. The defendant shot four times as the victim continued to run toward him; the defendant hit the victim twice; one of the shots fatally wounded him.

Death penalty not in effect

CP (domestic)

1974-128 (1971) MURDER & Bigamy & Incest 29607
OWENS, LOY ALTON (Life) (10 yrs.) (20 yrs.) COBB

SUMMARY: On February 15, 1971, the trailor in which the defendant and the victim, who was both the defendant's wife and his daughter and who was stil married to another man, were living caught fire. Testimony indicated that a flammable liquid had been poured on the floor of the trailer and on the victim and ignited. The defendant, who was unemployed and had been drinking, left the trailer. The victim then emerged in flames; she later died primarily from smoke inhalation and secondarily from burns. The defendant collected insurance on the trailer under a policy which expired two days later.

The defendant stated that the trailer burned because of flames coming from a Coleman lanters; that he attempted to put the fire out; and that he thought his wife had escaped from the trailer. He further stated that he was not the father of the victim and had not had sexual relations with her.

CP

1975-3 (1974) MURDER & Robbery 29675
SIMS, RICHARD (Life) (5 yrs.) FULTON

SUMMARY: On August 30, 1974, the robbery victim, a security guard, was waiting at a bus stop. The defendant stole the victim's gun, ran to a waiting automobile, and drove away with two companions. Further down the street, the defendant shot and killed an unarmed pursuer who had succeeded in persuading the driver of the automobile to stop.

The defendant stated that he accidently bumpled into the security guard, causing his gun to fall to the stree. The defendant grabbed the gun when the guard threatened him. The defendant was vague about the shooting.

PROSECUTOR WAIVED THE DEATH SENTENCE.

Judge imposed sentence.

1974-129 (1974) Murder (life) CP
BURKE, CHARLES JR. Armed Robbery, 2 counts (10yrs.)ea.) 29609
Aggravated Assault, 2 counts (1 yr. ea.) WALKER

SUMMARY: On December 14, 1973, the defendant and two friends drove to a small grocery store. The defendant entered the store then walked outside. His friends then entered the store, one carrying a sawed-off shotgun. The friends took money from the cash register, fatally wounded the proprietor, threatened and took money and other items from a customer, struck the customer with a shotgun, and fired the gun at a milk deliveryman who happened to come on the scene. The defendant remained outside during these events, but the defendant and his two friends left the scene together and shared the stolen money.

One charge of armed robbery was vacated because it was an included offense.

Principal Offender Dobbs 30543 Sentenced to Death

1975-4 (1973) MURDER 29680
JACKSON, TONY (Life) BIBB

SUMMARY: On April 11, 1973, the defendant and the victim who were friends were at a neighborhood party. The two men argued about the victim's improper conduct toward the defendant's wife. The two men were separated by others at the party, but soon began to fight. The victim grapped the defendant's legs. The defendant pulled a knife from his picket and s tabbed the victim twice, fatally wounding him.

The defendant stated that he stabbed the victim in self_defense.

Prosecutor waived the death sentence.

1975-5 (1974) MURDER 29683
STEWART, GEORGE (Life) BUTTS

CP

SUMMARY: On May 11, 1974, the defendant was waiting for his wife, from whom he was separated, at her apartment. When the wife and the victim drove into the parking lot, the defendant ran out of the apartment and began shooting at the automobile. The first shot went through the windshield. The wife ran out of the car. The defendant went to the car and shot the victim two more times, killing him.

The defendant stated that he fired the shots solely to protect himself when the victim tried to run over him with the car.

Prosecutor waived the death sentence.

1975-6 (1973) MURDER 29686
WOOD, JACK PETE (Life) TELFAIR

CP (DOMESTIC)

SUMMARY: On June 16, 1973, the defendant, a truck driver, returned home from an extended trip on the road. He had slept only three hours during the previous three days and had taken stimulants to remain alert. Upon arrival home, the defendant consumed about one-half of a case of beer. After driving his family around the town, the defendant drove his wife, the victim, to a wooded area. After questioning his wife concerning her activities with another man, the defendant shot his wife with his pistol.

The defendant stated that the shooting was an accident.

Prosecutor waived the death sentence.

1975-11 (1973) MURDER 29750
JACKSON, RUDOLPH, A. (Life) FULTON

MR

SUMMARY: On May 2, 1973, the defendant and the victim picked up two prostitutes. The four people rode in the victim's car to a club where they hoped to purchase some beer. During this ride the defendant discussed his plan to rob the victim. The victim and one of the prostitutes knocked on the back door of the club, but no one answered. When the victim returned to his car, the defendant and the other prostitute grabbed him around the neck, began choking him, and demanded his money. The victim got his pistol from the car and left the car. The defendant followed the victim out of the car. The victim shot at the defendant. The defendant then shot the victim in the chest, killing him.

The defendant stated that he did not intend to rob the victim and that he shot the victim in self-defense with a gun the prostitute gave him after the victim fired.

Prosecutor waived the death sentence.

1975-12 MURDER 29757
GRAHAM, ISAAC (Life) TATTNALL

CP

SUMMARY: On May 25, 1973, the defendant and the victim, both inmates, were in the shower area of the cell house. The defendant stabbed the victim six times with a sharpened silverware knife. Other inmates testified that the victim had threatened the defendant after the defendant refused his homosexual advances.

The defendant stated that he killed the victim in self defense.

Prosecutor waived the death sentence.

1975-16 (1973) MURDER (Life) 29764
LINGERFELT, JAMES Rev'd 9/2/75 FORSYTH

SUMMARY: This is a retrial of Lingerfelt 28240. Facts are summarized in Bennett 28037.

NOTE: Reversed because evidence used denied cross-examination.

1975-18 (1974) MURDER CP 29768
BROWN, THEORDORE (Life) CHATHAM

SUMMARY: On January 3, 1974, the defendant and his brother were in a cocktail lounge. The defendant and another patron began to argue. The defendant fired his pistol, shooting the patron in the arm and the patron's brother, the victim, The victim was fatally wounded.

The defendant stated that he did not commit the murder; rather, because the defendant was a prison escapee and already subject to imprisonment, he had agreed to take the blame for his brother who had done the actual shooting.

The judge ruled no aggravating circumstances were present & directed the jury to fix a life sentence.

1975-20 (1973) Remanded MURDER - 4 counts 29779
POWELL, HOYT (Life - 4 terms) C033
HACKER, LARRY (Life - 4 terms)
JENKINS, BILLY RICHARD (Life - 4 terms)
RUFF, WAYNE (Life - 4 terms)

SUMMARY: For facts, see Creamer 28639, and Emmett 28449.

Prosecutor did not seek death sentence because it could not be sought at this time under Furman .

Note: Remanded August 8, 1975, because of newly discovered evidence.

1975-24 (1974) MURDER & Pistol Misdemeanor (2 cts.) CP 29821
PARKS, JESSIE (Life) (12 mos. ea.) FULTON

SUMMARY: On April 27, 1974, the victim was visiting a witness whom he was dating. While they were sitting on the witness's sofa, the defendant, who had "gone with" the witness several years before, entered the apartment. The witness asked the defendant to leave. As he left, the witness shut the wooden door and the screen door behind him. A few seconds later a shot came through the door, fatally wounding the victim.

The defendant stated that he did converse with the witness for several minutes, but that he did not enter her apartment. He said that as he started to leave, a man accompanying him handed him a gun which went off accidentally.

1975-25 (1974) Rev'd MURDER
LEACH, FRANKLIN D. (Life) 29828
FULTON

SUMMARY: On September 12, 1973, the victim, a female cab driver, received a call to go to a residence where she picked up the defendant. In a written statement the defendant admitted that he drew a shotgun on the victim, demanded her money, and directed her to drive him to a secluded area. He then ordered the victim out of her cab and shot and killed her. The defendant fled the scene in the victim's cab and later abandoned the cab.
The defendant testified at the trial that the written statement was coerced and was not true.

NOTE: Reversed May 20, 1975, because the jury was charged concerning felony murder without an explanation or charge concerning armed robbery, the felony during which the murder occurred.

1975-29 (1974) MURDER CP
ENGLISH, TONY CURTIS (Life) 29861
FULTON

SUMMARY: On September 14, 1974, a group of people were waiting at a bus stop when the victim drove by and offered them a ride. They refused and the victim parked his car nearby. At this time the 16-year-old defendant appeared. The victim offered the defendant and the other people some beer and told them that he had plenty of money. The defendant then told the people that he intended to rob the victim. The others left the scene early the next morning, leaving the defendant and the victim behind. Several hours later, the others returned and found the victim on the ground dying. The defendant emerged from some nearby bushes admitting that he killed the man. The defendant told another witness that he had shot the victim because the victim had pulled a knife on him. The defendant later denied shooting the victim.

NOTE: The judge directed the jury to impose a life sentence.
The evidence was circumstantial.
The defendant was 16 years old at the time of the commission of the crime.

1975-30 (1974) Rev'd MURDER
GAITHER, BERTO LEONARD (Life) 29863
FULTON

SUMMARY: On June 22, 1974, the defendant went to the house of his friend, the co-defendant. The two talked of getting some money as they drank beer and took pills. They then went looking for someone to rob. Upon seeing the victim walking on the sidewalk with a bag of groceries, the defendant handed the co-defendant a gun. The co-defendant approached the victim and asked him for money. During the ensuing scuffle, the codefendant shot and killed the victim.
The defendant denied that he had planned the robbery. He also stated that he did not know that the codefendant planned the robbery until the codefendant had stopped the victim.

NOTE: Reversed May 19, 1975, because the judge's charge expressed his opinion to the jury that the defendant was guilty of the crimes charged.

1975-35 (1974) MURDER & Agg. Assault Domestic
SHY, THOMAS HENRY (Life) (19 yrs.) CP 29891
FULTON

SUMMARY: On February 20, 1974, the defendant's wife, the victim, and a male friend were seated in the friend's automobile. They were talking when the defendant drove up and pulled a gun on them. After a short discussion the defendant fired some shots into the car. The defendant then took the victim's gun from her jacket and held both guns on the victim and her friend during a discussion which lasted about an hour. When the friend noticed that he had been shot, the defendant and his wife started scuffling. The defendant then fired both guns into the car, wounding the friend and killing the defendant's wife.
The defendant stated that he had only one gun which he drew and fired only in self-defense after his wife's friend fired at him and his wife.

NOTE: Counsel for the defendant requested that the judge sentence the defendant after the jury returned a verdict of guilty. It had previously been agreed that a life sentence was the only one possible.

CP

1975-37 (1974) MURDER 29896
ATTIE, ROBERT LEE (Life) SULTER

SUMMARY: On November 1, 1974, the defendant went to a local club. While here he threatened to pay back the victim for an incident which had occurred several months earlier in which the victim had slashed the defendant's face with a knife. After making the threat to the manager, the defendant left the club. About one hour later, the victim entered the club. The defendant followed him in brandishing a knife. When the victim also pulled a knife, the manager of the club requested both men to leave. Once outside, the defendant got a rifle from his car. The defendant then fired at victim who was in his own car, killing him.

The defendant stated that he shot the victim in self-defense, thinking that the victim was reaching for a gun.

The judge imposed a life sentence with no discussion.

Domestic
CP

1975-39 (1974) MURDER 29925
LINDSEY, JAMES AUTREY (Life) COFFEE

SUMMARY: The defendant was married to, but separated from, the victim's sister. On October 13, 1974, the defendant went to the house where the victim, the defendant's wife, the victim's brother, and the victim's mother lived. After the defendant and his wife began to argue, the other members of the family ousted the defendant from the house. The defendant went to his car and returned with a shotgun. When the family members prevented the defendant from re-entering, he fired the shotgun through the door of the house. The victim was shot and killed, and the victim's mother and brother were injured from the shotgun blast.

The defendant stated that he shot the victim in self-defense after the victim had attempted to shoot him.

The prosecutor waived the death sentence.

CP

1975-40 (1968) MURDER (Life) 29931
LAVENDER ARTIS Misdemeanor - Pistol (12 mos) FULTON

SUMMARY: On November 2, 1967, the defendant, who had been drinking, was sleeping on a couch in the tavern which the victim managed. The victim awakened the defendant who started uttering profanities and walked him to the door. A few minutes later, the defendant re-entered the bar with a pistol and started shooting. The victim attempted to run, but slipped and fell. The defendant then shot him in the head, killing him. When apprehended, the defendant inquired about the victim's condition and was told he was alive. The defendant replied, "I am sorry the son-of-a-bitch is not dead."

The defendant stated that the shooting was justifiable homocide in that the defendant believed that the victim had gotten a pistol which he kept in the back of the bar and was starting toward him.

NOTE: Defendant was granted an out-of-time appeal.

MR

1975-41 (1975) Rev'd MURDER 29934
HENDERSON, LEROY (Life) GWINNETT

SUMMARY: On November 29, 1974, while helping the victim move into a trailer the defendant dropped some of the victim's belongings. The victim cursed the defendant, threatened to shoot him, and snapped a pistol at him. The defendant ran to his home, got a rifle, and returned to the area of the trailer. As the victim and two companions approached the defendant's location, the defendant yelled to the victim that he would shoot him. The defendant then shot and killed the victim.

The defendant stated that he shot the victim in self-defense after the victim drew his pistol. The victim's two companions did not see the victim draw his pistol, but the pistol was found near the body of the victim with two bullets, one with a firing pin indentation.

Reversed Sept. 2, 1975 on three grounds: The trial court erred in excluding testimony as to the victim's general reputation for shooting people; it erred in refusing to give a requested charge on voluntary manslaughter; it erred in placing the burden on the defendant in its charge to prove beyond a reasonable doubt that he was acting under a reasonable fear that his life was in danger.

CP

1975-43 (1974) MURDER 29947
GLASS, DORSEY LEE (Life) FULTON

SUMMARY: On July 4, 1974, the woman with whom the defendant had lived for eight years told him to leave. The next day, the defendant went to the woman's place of employment and threatened to kill her. On July 6, 1974, the defendant called her home three times threatening to kill her. That evening the victim, who was a neighbor, visited the woman and her family. The victim left to go to a nearby store. Upon her return she stated that she had seen the defendant walking up the street with a rifle wrapped in newspaper. Later the victim was shot & killed by shots coming from across the street. Several witnesses identified the defendant as the one shooting the rifle.

The defendant stated that he had become intoxicated earlier that afternoon and had spent the rest of the day and the night at some friends' house.

The prosecutor waived the death sentence.

1974-45 (1974) Rev'd MURDER 29960
STAMPER, ROBERT LANSING JR. (Life) DEKALB

SUMMARY: The mother of the three-year-old victim had lived with the defendant for a year with her two children. In July 1974, the mother went to Boston with her children. On August 9, 1974, she sent the children by airplane to the defendant who paid their plane fare. On August 19, 1974, an emergency unit was called to the home of the defendant where the defendant was found givin g mouth-to-mouth resuscitation to the victim. The unit took the child to the hospital where she died two days later. Medical experts testified that the child died from blows to the head with a blunt instrument, possibly a fist. Other testimony indicated that the victim was a battered child and that the defendant was intoxicated on the night of the offense.

The defendant stated that the victim was taking a bath while he was watching television. He heard a thud and found her lying unconscious in the bathtub. He denied inflicting injuries on the child.

Defendant convicted on circumstantial evidence.
Prosecutor did not seek death sentence.

NOTE: Reversed because hearsay statements which were highly prejudicial to the defendant were erroneously admitted.

CP

29962 (1974) MURDER 29962
DAVIS, ALLEN (Life) FULTON

SUMMARY: On June 25, 1974, the defendant was caring for the victim, his two-year-old stepson. In a written statement the defendant stated that he whipped the child after the child soiled his pants, then placed him in a tub of hot water. While he was in the water, the child's head kept going under. After the defendant took the victim out of the tub he applied alcohol to the child's burned buttocks. The child then defacated again and the defendant again placed him in the tub. At this time the defendant noticed that the child was unconscious. The defendant then called for help. It was determined that the child died from drowning.

The defendant testified that the child slipped in the bathtub and that he did not realize the child w as drowning.

Prosecutor waived death sentence by agreeing to have the trial judge impose sentence rather than jury.

1975-51 (1974) MURDER 29991
HENDERSON, AUBREY, JR. (Life) CLAYTON

CP

SUMMARY: On March 31, 1974, the defendant's brother, David, and three other men went to the victim's home to install a starter in David's automobile. While David was working on his automobile, the victim appeared with a pistol and accidentally shot David in the shoulder. One of the other men ran to the home of David's father and yelled that David had been shot. The defendant, who was at the house and who had been drinking, went inside, got a shotgun, and went to the victim's home. The defendant confronted the victim, then shot and killed him with the shotgun.

The defendant claimed that he shot the victim in self-defense, that he did not know the victim had shot his brother accidentally, and that he did not know that the victim was unarmed when the defendant shot him.

The prosecutor waived the death sentence.

(1974)
JONES, FREDERICK EUGENE — MURDER (Life) — CP — 29994 BIBB

SUMMARY: The victim was an employee of the defendant, a masonry contractor. After a few days on the job, the victim quit. On March 2, 1974, the victim had unsuccessfully attempted to obtain his paycheck for several days when he spotted the defendant's van in a shopping ceneter. The victim parked beside the van and argued with the defendent for several moments. The driver of the van left the shopping center. The victim followed the van. When it stopped at an intersection, the victim got out of the car in which he was riding and approached the defendent. The men argued again. The van then turned the corner, the defendant opened the door and fired three shots, killing the victim.

The defendant testified that the victim had hit him in the face and blinded him and that he had fired the gun in self-defense.

The trial judge instructed the jury to impose a life sentence.

1975-53 (1973)
SANDERS, DAVID LEE — MURDER (Life) — CP — 29997 MONROE

SUMMARY: On the morning of July 6, 1973, the 20-year-old defendant went to the 26-year-old victim's house on a dairy farm. The defendant was an employee of the victim's husband on the farm. After the victim let the defendant in, the defendant raped her, tied her hands, feet and neck, and fatally shot her.

The defendant gave a statement to the sheriff incriminating himself. Extensive circumstantial evidence was also introduced at the trial.

1975-56 (1973)
MCCONNELL, GAYLORD — MURDER (Life) — CP — 30014 WALKER

SUMMARY: The female victim was last seen on December 5, 1972. Her body was found on December 9, 1972, covered with brush and vines across from the house in which the defendant lived. Death resulted from blows to the head which caused brain damage. In addition to lacerations and bruises on the body, 16 puncture wounds in the neck and 4 puncture wounds in the chest which appeared to have been inflicted with a table fork were found. Evidence indicated that the victim was seen with the defendant shortly before her final disappearance in the area in which the homocide occurred and that the murder occurred in the defendant's house. Also, the defendant had made an incriminating statement to a witness after the homocide occurred.

The evidence was circumstantial.

Death penalty was not in effect at the time of the murder.

1975-57 (1974)
ERCH, THOMAS GEORGE, JR. — MURDER & Armed Robbery (Life) (4 yrs.) — CP — 30017 CHATTOOGA

UMMARY: On May 8, 1974, the defendant and two acquaintences smoked pot in he defendant's trailer, then left to drink some beer. They went to a town here they saw the victim who joined them. The defendant drove up an bandoned road, stopped, and the four men got out of the car. The defendant it the victim in the head with a ball peen hammer, then gave the hammer to ne of the other men who hit the victim with it. The defendant then tried o cut the victim's throat, he took the victim's wallet, and he removed the 30.00 it contained. The other man threw a rock at the by-then helpless ictim and jabbed a stick into his scull.

After his arrest the defendant made a detailed confession to the murder; owever, he testified at his trial that on the date of the murder he was t his trailer most of the day.

rial judge imposed life sentence stating that it was the only possible entence to impose.

ee also 30306, WILSON

CP

1975-65 (1974)
SCOTT, CHARLIE JR. — MURDER (Life) — 30078 FULTON

SUMMARY: On October 3, 1974, the victim, a boyfriend of a boarder in the defendant's house, and the boarder were arguing. After the defendant told them not to fight in his home, the victim threatened him. The victim then went into the boarder's bedroom. The defendant went into his own room, obtained his pistol, left his room, and fatally shot the victim.

The defendant stated that he thought that the victim was reaching for a gun he had obtained in the boarder's room and that he shot him in self-defense.

The trial judge imposed the life sentence.

1975-677 (1975) Rev'd — MURDER — 30087
RINI, JAMES JOSEPH — (Life) — HALL
alias JAMES, MICHAEL JOSEPH

SUMMARY: On February 1, 1975, the defendant, the manager of the apartments in which the 16-year-old victim lived, asked his roommate to go get the victim. The defendant borrowed a friend's car and he, his roommate, and the victim drove out I-85. The defendant stopped at the side of the expressway and directed the victim to get out of the car. The defendant and the victim walked down a hill to the edge of some woods where the defendant fatally shot the victim three times.

The defendant stated that he had spent the entire night of the murder in his own apartment.

The trial judge imposed the life sentence.

Reversed September 11, 1975, on two grounds: Evidence of the commission by the defendant of prejudicial criminal acts unrelated to the murder for which the defendant was being tried was erroneously admitted; and an investigator was erroneously permitted to testify that in his opinion the defendant answered his questions evasively.

New trial 30890 1976-8

1975-685 (1974) — MURDER — CP — 30091
GARLAND, CLAUDE — (Life)
BRADSHAW, CLARENCE — (Life)
RABUN

SUMMARY: On March 27, 1974, the two defendants, who were drinking at a local tavern, decided to go to the victim's trailer. At this time the defendant Garland was angry because the victim had accused him of stealing his dog. Around midnight another man was beaten by the defendant Bradshaw for refusing to with him to the victim's home. Around 3:00 AM, Garland knocked on the door of the victim's trailer. After the victim answered the door, he went out to the automobile in which Bradshaw was sitting. Bradshaw raised his shotgun to the automobile window and fatally shot the victim.

Bradshaw stated that he and Garland had not discussed going to the victim's hom and that the shotgun was in his automoble because he intended to go rabbit hunting. He stated that he shot the victim in self-defense when the victim placed his own shotgun in Bradshaw's face and told him to get out of the car. Garland testified that he remained in the victim's trailer while the victim was shot.

The prosecutor waived the death penalty.

CP

1975-69 (1975) — MURDER — 30093
REEVES, GARY — (Life) — FLOYD

SUMMARY: The defendant and the victim had lived together as common law husband and wife for five years. On August 12, 1974, the defendant and the victim had worked at the tavern which the victim owned until midnight. They left the tavern and went home in separate automobiles. On his arrival home, the defendant appeared to be angry and intoxicated and threatened to shoot out the lights of a service station across the street. About an hour later the defendant asked his wife to fix him something to eat. She agreed. The defendant then shot her several times, killing her.

The defendant never denied shooting the victim; however, he claimed that he could not remember shooting her.

The prosecutor waived the death sentence.

1975-70 (1973) Rev'd — MURDER - 2 cts. — 30094
WARD, EDWARD JR. — (Life - ea. ct.) — DEKALB

SUMMARY: On June 28, 1973, a general office manager and a secretary of a waterproofing company were found slain by a sword or similar weapon. The woman's body was almost decapitated; the man's body had been stabbed 11 times. Although there were no witnesses to the murders, evidence connecting the defendant to the crime was found in a nearby wooded area and in the defendant's room. In addition, the defendant had recently been fired from the company and had threatened the male victim.

The defendant denied any knowledge of the murders and stated that he had been shopping when they occurred.

REVERSED because alibi charge shifted burden of proving alibi to defendant thereby violating due process.

See Ward 31993 for Retrial with both sentence issues.

1975-75 (1974) MURDER 30105
REVILL, FRANK SR. (Life) CP COLQUITT

SUMMARY: On August 19, 1974, the defendant and his wife of 25 years, the victim, had an argument. The defendant left the house and told his neighbor to give the keys to his car to his son and keep one for himself, to look after his children, and to tell his son to visit him in the jail. About 20 minutes later the defendant shot his wife 6 times, killing her.

The defendant stated that he and his wife argued about her going out with other men. He said that he did not remember shooting his wife.

Prosecutor waived death sentence.

1975-77 (1974) MURDER 30111
LEUTNER, CHRISTOPHER EDWARD (Life) CP BIBB

SUMMARY: On July 25, 1974, the 17-year-old defendant went to a bowling alley and took his father's pistol with him. He intended to find out who had stolen some drugs from his home the previous night. The defendant invited the 16-year-old victim outside to smoke a joint with him. After the victim denied taking the drugs, the defendant fatally shot the victim in the head.

The defendant stated that the shooting was an accident and that the hammer of the once-broken pistol had accidentally slipped.

The state waived the death penalty because of the age of the defendant.

1975-83 (1975) MURDER & Armed Robbery 30141
ZIRKLE, CAROLYN DALE (Life) (20 yrs.) CP JACKSON

SUMMARY: On November 14, 1974, the 17-year-old female defendant and a male companion planned to rob a liquor store. They abandoned this plan when they saw a revolver next to the store's cash register. The same evening they stopped at a gas station which the victim managed. While the defendant was using the station's telephone, she noticed the victim counting the day's receipts. The defendant's companion pulled a gun on the victim and demanded the money. After the victim gave up the money, the defendant took the gun from her companion and fatally shot the victim. When the defendant and her companion were apprehended, $400.00 and a gun were found in her pocketbook

1975-76 (1975) MURDER 30108
PINSON, WILLIE JAMES (Life) COWETA

SUMMARY: The victim, a frequent gambler, was last seen on November 27, 1974, when he told his father that he was going to the defendant's home to collect some money owed him. Police found the victim's automobile at the airport and the parking ticket for it in the defendant's home. At the defendant's direction, the police looked in a well on the defendant's property and found the victim's dead body. Cause of death was determined to be gunshot wounds.

The defendant stated that the victim came to his house to gamble with two men whom the defendant did not know. At one point the defendant left the room where the four men were gambling and returned to see one of the men shoot the victim with the defendant's shotgun. Both of the men threatened to kill the defendant and his girl friend if he did not help them dispose of the body. The two men were never found.

Conviction based on circumstantial evidence.

Trial judge imposed life sentence.

1975-84 (1974) MURDER - 2 cts. 30149
SHEPPARD, RICKY LEE (life sentence on each count) CP FULTON
Agg. Assault - 5 yrs.

SUMMARY: On July 28, 1974, the 19-year-old defendant drove five young boys to play baseball. After the game two of the boys got in the car, but the other three boys hopped on the trunk of the car. The defendant swerved the car until the boys fell off. The defendant told the boys to get in the car. They refused and one yelled an obscenity. The defendant, appearing to be angry, drove away, but returned at the request of one of the boys in the car. The defendant aimed the car at the three boys who were walking on the shoulder of the road, killing two of them and injuring the third.

The defendant stated that the killings were the result of an accident in that the car went out of control and he blacked out.

Prosecutor waived death penalty.

1975-85 (1975) — MURDER (Life) — CP — 30152
FOREHAND, WILLIE L. — FULTON

SUMMARY: On October 19, 1974, the defendant, who had been drinking beer, and the victim were arguing in a bar. The defendant shot at the victim four times; as the victim fell, the defendant fired two more shots at him.
The defendant denied shooting the victim and denied being at the bar at the time of the killing.

Prosecutor waived death penalty.

1975-88 (1975) — MURDER (Life) — 30166
PRESSLEY, FRANK LEE — MURDER (Life) Armed Robbery (Life) — CP — COBB

SUMMARY: On December 19, 1974, the defendant borrowed a pistol from a friend because he and two companions planned a robbery. The defendant and one of the companions entered the victim's furniture store and warehouse where the defendant fatally shot the victim. They then took the victim's wallet containing $140.00 and fled.

NOTE: On Sept. 23, 1975, the trial court was directed to vacate the sentence for felony murder because it is an offense included in malice murder.

1975-90 (1974) — MURDER (Life) — Domestic — CP — 30189
RAMPLEY, JOSEPH WAYNE — CHEROKEE

SUMMARY: On April 25, 1973, the defendant was at his home with his two children while his wife was working. One child was 2 years old; the other child, who was the victim, was 3 months old. When the victim would not stop crying, the defendant spanked her. He also hit her on the leg three times with his fist and fatally hit her on the head. When the defendant's wife returned home, she found the child dead.
The defendant raised a defense of insanity.

Prosecutor waived death penalty.

1975-91 (1973) — MURDER (Life) — CP — 30190
OWELL, JEROME — BRYAN

SUMMARY: On January 27, 1973, the defendant saw his sister and her boyfriend rguing so he walked home with them. When they arrived at the house, the ister was crying and the defendant tried to get her to go inside. The victim ho was the defendant's aunt, told the defendant not to make his sister go n the house. The angered defendant slapped the victim, struck her with is shotgun, then fatally shot her in the head.
The defendant stated that the gun went off accidentally when the victim natched it.

eath penalty not in effect.
ourt granted out-of-time appeal.

1975-93 (1973) — MURDER (Life) — CP — 30197
ENNON, HUGH HINIA III — CRISP

SUMMARY: On October 18, 1970, the defendant was arrested by a policeman, the victim, for selling newspapers without a permit. As the policeman was driving the defendant to the station, the defendant shot and killed him.
The defendant stated that the officer slapped him and drew his pistol and that the gun went off as the two men struggled.

Death penalty not in effect.

1975-96 (1975) — Rev'd — Murder & Robbery by Forde — CP — 30217
PARRIES, ELVIN S. — (Life) (20 yrs.) — TOOMBS

SUMMARY: On December 19, 1974, the 86-year-old victim was struck over the head with a claw hammer and robbed in his home of over $100.00. Before he died of head wounds inflicted by the hammer, the victim identified the defendant as the assailant.
The defendant's defense was alibi which witnesses supported.

The trial judge imposed the sentences.

Reversed because hearsay testimony was improperly admitted and was prejudicial.

1975-100 (1974) MURDER 30223
JOHNSON, WALTER HENRY JR. (Life) NEWTON

SUMMARY: The defendant was a medical doctor who had not practiced since 1970 because he was afflicted with narcolepsy (uncontrollable sleep). The defendant took the drug Ritalin regularly, drank large amounts of wine, and took the drug Darvon. On July 8, 1974, the defendant and his wife, the victim, requested the defendant's son to fly up from Florida. When the don arrived the same day, the defendant informed him that the victim was dead. The son found the victim dead from shotgun wounds and found his father in an incomprehensible state.

The defendant maintained that he had no memory 6f July 8. He raised a defense of insanity.

The trial judge imposed the life sentence.

1975-101 (1974) MURDER 30228
GAY, ALICE (Life) FULTON

SUMMARY: On August 5, 1974, the defendant, the victim, and a third person rode in the defendant's car to a liquor store. The victim had been uttering obscenities to the defendant. The victim got out of the car and walked toward the store. The defendant took a gun out of her purse, got out of her car, and began firing at the victim. She chased him around the car, and as he fell down she fired a last shot into his back.

The defendant stated that the victim had slapped her and pulled a knife on her earlier in the evening. She said that he was holding aknife on her before he started to enter the store and that she fired the gun only in order to escape him.

Prosecutor waived the death sentence.

1975-105 (1973) MURDER, 2 cts. & Agg. Assault 30242
STAPLETON, EARLY LEWIS (Life - 2 terms) (10 yrs.) LAURENS

SUMMARY: On December 2, 1972, the defendant, the three victims, and a fifth person had spent the evening drinking. Early the next morning they were driving to get a steak dinner. The defendant suddenly began firing his pistol, killing two of the victims and wounding the third. The defendant fled the scene, but returned after the police arrived and told them he had done the shooting.

In a taped confession by the defendant which was admitted into evidence, he claimed that he shot the victims in self-defense.

1975-107 (1974) MURDER & Concealing Death 30250
NUNNALLY, ALICE ELIZABETH (Life) (12 mos.) COBB

SUMMARY: On July 11, 1974, the victim, a friend of the defendant, called the defendant and requested her to pick him up at a nearby shopping center. After their arrivel at the defendant's home, the victim suggested they check out a pistol which the defendant had bought to give to a friend. As the defendant and the victim walked down the basement steps to go outside the defendant had the loaded gun in her hand. The victim tried to grab the gun from her and the defendant pulled back and fired the weapon. At an earlier time, the defendant had stated that the gun had accidentally hit a support beam and fired as the victim reached for it.

Prosecutor waived death penalty.

1975-111 (1974) MURDER CP 3026
RAY, WILLIAM B. (Life) GILE

SUMMARY: On July 10, 1974, the defendant and the victim, who lived togeth in the defendant's trailer, were arguing and drinking. The defendant beat the victim with his fists, pulled her by her hair back into the trailer, a inflicted on her fatal blows to the head and neck.

The defendant testified that he had only struck the victim once and tha she died accidentally when she stumbled into the door frame, hit her head and fell to the ground.

Prosecutor waived death penalty.

1975-114 (1974) MURDER & Armed Robbery CP 30274
HARRIS, LARRY JEROME (Life) (20 yrs.) MUSCOGEE

SUMMARY: On November 4, 1974, the victim, a member of the armed services, told the defendant who was a friend of his and also in the Army, that he had received $1,000 in advance pay. The defendant shared this information with the co-defendant. That evening the defendant and the co-defendant went to the victim's apartment, where they robbed the victim of $200, his wallet, and the box in which he kept valuable papers. The victim was then shot and killed.

The defendant testified that his co-defendant committed the murder and the robbery while the defendant was talking to the victim's wife in the laundry room.

Prosecutor waived death penalty.

1975-117 (1975) MURDER 30279
KESLER, ANTHONY PARKS (Life) BANKS

SUMMARY: On March 23, 1975, the defendant and the victim were having a few drinks together when they started to argue. They then separated and the victim went over to his automobile which was parked in the gas station where he worked and laid down in it. The defendant later returned to the station, opened the door of the victim's car, and woke him. The victim got out of his car, grabbed at the defendant several times, fell, got up, then put his hand in his pocket. At this point the defendant pulled out his gun and told the victim to stop; when he did not, the defendant shot and killed him. The victim was not armed.

The defendant claimed he shot the victim in self-defense, thinking the victim was reaching for a gun which he usually carried when he put his hand in his pocket.

Shooting following drinking between defendant & victim.

1975-124 (1975) MURDER 30316
ROCTOR, CHARLIE, JR. (Life) DOUGHERTY

SUMMARY: On December 25, 1974, the defendant shot and killed the victim. The victim had been arguing with the defendant's girl friend and her sister and had stabbed both of them with a butcher knife. The defendant chased the victim out of the house when he heard he had stabbed his girl friend and shot him.

The defendant testified that he shot the victim in self-defense because he thought the victim was going to cut him with the butcher knife also.

Trial judge imposed life sentence.

1975-120 (1975) MURDER CP 30299
EDWARDS, CATHERINE (Life) FULTON

SUMMARY: On February 19, 1974, the defendant went to the place of employment of her husband, the victim. The couple argued, then went outside where they continued to argue. The defendant then shot and killed the victim.
The defendant stated that she shot the victim in self-defense.

Prosecutor waived the death sentence.

1975-57 (1974) MURDER & Armed Robbery CP 30306
WILSON, BILLY RAY (Life) (4 yrs.) CHATTOOGA

SUMMARY: On May 8, 1974, the defendant got together with two friends at a friends trailer where they drank beer and smoked marijuana. The three young men later drove around and picked up the 18-year-old victim who was paid that day. They then went to an abandoned area where one of the men hit the victim on the head with a hammer. He then gave the hammer to the defendant who also hit the victim in the head with it. The defendant threw a large rock at the victim's head and jabbed a stick into his skull. The men also took money from the defendant.
The defendant testified that he was not with the other men when they committed the murder.

The prosecutor waived the death penalty.

See also 30017, LEACH

CP 53

1975-127 (1975) MURDER & Armed Robbery & Auto Theft 30325
TARPKIN, JOHNNY (Life) (20 yrs.) (7 yrs.) JACKSON
TARPKIN, ROBERT LEE (Life) (20 yrs.) (7 yrs.)

SUMMARY: On January 15, 1975, the defendant Johnny Tarpkin, and two other men bought bus tickets from the victim, the manager of the bus station. The three men left the bus station and talked to defendant Robert Tarpkin who then stole an automobile. Defendant Robert waited outside the station while the three other men again went inside. The victim was shot and killed, and robbed of his wallet and the money it contained by the three men.

NOTE: Conviction of armed robbery was vacated as to the defendant Robert Tarpkin, because it is a lesser included offense of murder.

Never clear who actually did killing

1975-129 (1975) MURDER CP 30339
ALBERT, EDDIE LAWRENCE (Life) HENRY

SUMMARY: On January 19, 1975, the defendant received a phone call referring to the location of the victim, who had robbed the defendant the previous week. The defendant then called the two co-defendants and asked them to meet him at the location of the victim. The defendant picked up another man on his way over. The defendant and one co-defendant went to the apartment tied the victim up, took him out of the apartment, put him in the trunk of the car, and drove the car to an abandoned area. The defendant then shot the victim and dumped him into a well.
The defendant stated that he shot the victim accidentally.

Prosecutor waived death penalty.

See also 30340 and ~~31302~~ 31834

1975-130 (1975) MURDER 30340
PULLIN, RALPH, JR. (Life) HENRY

cp

SUMMARY: On January 19, 1975, the defendant received a phone call from a friend requesting him to meet the friend at an apartment building. The friend had found out that the victim, who had robbed him earlier that week was in the building. The defendant drove to the building. The victim was tied up by the co-defendants, taken out of the apartment, put in the trunk of a car, and driven to an abandoned area. One of the co-defendants shot the victim and dumped him into a well.

The defendant stated that he merely went to the apartment building and later followed the co-defendants;

Prosecutor waived death penalty.

See also 30339 and ~~31522~~. 31834

cp

1975-133 (1974) MURDER - 2 cts 30352
ALLANSON, WALTER THOMAS (Life _ 2 terms) FULTON

SUMMARY: On July 3, 1974, the telephone lines leading to the house of the defendant's parents, the victims, had been cut. The defendant's father went into the basement to investigate the lines. He yelled from the basement that he had "him" cornered in the cubby hole and to get the children out of the house. He then yelled for his wife to bring a rifle. As the defendant's mother was going down the basement steps, she was shot & killed by the defendant. The defendant's father was also shot and killed by the defendant.

Prosecutor waived the death penalty at the request of the victims' families

1975-136 (1975) MURDER - 2 cts. 30365
BRANNEN, CHARLES MICHAEL (life - 2 terms) LOWNDES

SUMMARY: On August 22, 1974, the 14-year-old defendant and a friend shot and killed two men. The defendant shot one of the men and pushed him into the creek; then he shot the second man. When the second man tried to climb out of the water, the defendant's friend shot the man again.

The defendant's defense was that he was under a delusional compulsion when he fired the fatal shots.

Trial judge imposed the sentences.

1975-139 (1974) MURDER 30383
PARROTT, KEITER (Life) GREENE

cp

SUMMARY: On December 2, 1973, the sister of the victim was run off the road by the defendant. When the victim heard of this he and the defendant had a fist fight at a local drive-in. The defendant later returned and started firing with a rifle at the car in which the victim sat. The victim got out of the car and grabbed the rifle from the defendant. The defendant then had a pistol in his hand which the victim's friend hit with his body. The defendant then shot and killed the victim.

The defendant stated that the victim was shot accidentally while the defendant was struggling with the victim's friend.

Mandt Mutual Mfg

56

1975-143 (1974) MURDER CP 30412
SMITH, GARY (Life) GREENE

SUMMARY: On June 1[illegible], 1974, the defendant went to the home of the elderly victim and bought some beer from him. He returned to the victim's home later in the day armed with a shotgun. The defendant robbed the victim of two wallets containing $77.00, two pistols, and a shotgun, and fatally shot the victim in the chest.

1975-147 (1975) MURDER (Life) CP 30441
TURNER, RUDOLPH ALONZO Armed Robbery (Life) COLQUITT
Kidnapping (20 yrs.)

SUMMARY: On August 24, 1973, the defendant and three co-conspirators went to what they thought was a storeowner's home. They awaited the owner's arrival in order to rob him of his day's receipts. While they waited they terrorized the people who were in the home who were babysitting for the storeowner's child. When the storeowner did arrive, two of the conspirators forced him and another hostage to accompany them to the home of the other storeowner to get the money box. They took the money box after an exchange of gunfire and left the hostages behind. The police were called and went to the house where the defendant and fourth conspirator were waiting. The fourth conspirator shot and killed one of the policeman.

The jury was unable to reach a verdict as to the penalty for murder so the trial court set the penalty at life.

Pawnshop Offender Ross 29085 Sentenced to death

1975-148 (1975) MURDER CP 30444
GRAHAM, EARNEST R. (Life) CRAWFORD

SUMMARY: The defendant and his wife, the victim, owned, operated and lived at a truck stop. On March 3, 1974, several men were playing poker in one of the back rooms. Shortly after midnight, one of the men sitting at the card table was wounded by a bullet which was fired from the adjoining kitchen. The victim, who had been sitting at the card table, rushed toward the kitchen door. As the door opened, the defendant appeared and shot at the victim with a pistol, fatally wounding her.
The defendant raised an insanity defense.

Prosecutor waived death penalty.

1975-149 (1975) MURDER MR 30445
BROWN, JEANNE (Life) FULTON

SUMMARY: On February 5, 1975, the defendant and her husband, the victim, were arguing. The defendant testified that the victim stumbled toward her as she was holding aknife she was using to cut sausage. The intoxicated victim then accidentally fell on the knife. In a statement given to police shortly after the murder, the defendant stated she was going to threaten the victim with the knife, but did not intend to stab him with it.

Prosecutor waived death penalty.

1975-156 (1975) MURDER & Burglary CP Domestic 30486
BROWN, EARL LEE (Life) (20 yrs.) 30487
GWINNETT

SUMMARY: The victim was engaged in a furniture moving operation with John Pendleton. In December, 1974, Pendleton contacted the defendant and offered to pay him to murder the victim. On December 13, 1974, the defendant used a revolver to gain entrance to the victim's apartment; he then strangled the victim with a ligature. The victim's body was later discovered in a parking garage.
The defendant denied that he killed the victim and used alibi as a defens however, he did admit that he removed the body from the apartment to the parking garage and took a bank of pennies from the apartment.

The trial judge imposed the life sentence after the jury failed to reach a verdict as to the sentence.

Appeal dismissed for failure to file enumeration of errors.

1975-161 (1974) Rev'd MURDER 30513
REEVES, ROBERT (Life) BALDWIN
CARROLL, ELLA LOUISE. (Life)
JOHNSON, WILLIE JAMES JR. (Life)

SUMMARY: The victim lived across the street from the defendant Carroll and the defendant Reeves who were brother and sister. The thrid defendant Johnson was the boyfriend of Carroll. On April 4, 1974, the victim was fatally stabbed while in his home. Before he died he identified a person other than the three defendants as his attacker. However, circumstantial evidence as well as statements by Carroll indicated that either Reeves or Johnson did the actual killing.

Prosecutor waived death penalty.

Reversed because: 1) Admission of the co-defendant's confession implicatin the other defendants at the joint trial was prejudicial error;
2) Admission of two written statements by defendant, one exculpatory and one inculpatory, and the exclusion of two other written statements by defendant, both exculpatory, was prejudicial error;
3) the three defendants should have been granted separate trials.

[illegible] (1975)
LITTLES, CHARLES — MURDER (Life) — 30514 GREENE

SUMMARY: On August 12, 1974, the defendant entered the victim's house and shot her in the head with a pistol. He shot the victim again as she ran into her yard. The gunshot wounds in the victim's head resulted in partial paralysis and a psychosis. On December 25, 1974, the victim died from pulmonary embolus which could have been caused by problems caused by the gunshot wounds.

The defendant stated that he did not shoot the victim. On August 12, he heard a scream and went to help the victim, but a man shot at him. He said he thought the man shot at him because he owned a valuable religious scroll.

Prosecutor waived death penalty.

1975-164 (1975)
DUPREE, LIMMIE, JR. — MURDER (Life) — CP — 30525 FULTON

SUMMARY: On March 6, 1975, the defendant went to the apartment of the victim, a friend of his. The defendant had been seen by three different people earlier that day with a pistol. As the sister of the victim left the apartment and got into her car, she heard a shot. She then returned to the apartment where she saw the victim lying unconscious from a gunshot wound to her head.

The defendant stated that someone whom he could not identify ran into the living room, shot the victim, then ran out.

Prosecutor waived the death penalty.

975-168 (1975)
ESSNER, MATTHEW FREDERICK — MURDER - 2 cts. (Life - 2 terms) — Domestic CP — 30558 MUSCOGEE

UMMARY: The defendant had been married to one of the victims for ten years hen they were divorced in January 1975. In the same month the defendant as admitted to a private psychiatric hospital from which he was granted a eekend pass on February 9, 1975. That day he went to the home of his former ife where he found his wife sitting on the couch with her boyfriend, the econd victim. The defendant shot both his former wife and her boyfriend everal times with a pistol. Both victims died from the gunshot wounds.

The defendant pled insanity at the time of the homocides; he also pled ccident with regard to the killing of his former wife.

State waived death penalty.

[illegible] (1974)
HERLONG, JAMES JR. — MURDER (Life) — 30626 TURNER

SUMMARY: On January 19, 1974, the victim and his girlfriend were parked in the victim's car. The defendant and the co-defendant approached the car and requested some liquor from the victim, a bootlegger. The victim drove the defendant and the co-defendant to a place behind a peanut mill. When the victim got out of the car and opened the trunk to obtain the liquor, he was fatally shot by the defendant and beaten over the head with a sharp instrument by the co-defendant.

The defendant stated that he had never left his home on the night of the murder.

Prosecutor waived death penalty.

1975-179 (1975)
ADAMS, OTIS — MURDER (Life) — Domestic CP — 30631 FULTON

SUMMARY: On November 22, 1974, the defendant arrived home and found the victim, his common law wife, drunk. As the defendant and the victim argued, the defendant fatally shot the victim in the head.

The defendant stated that the victim hit him in the head with a hammer causing him to blank out and that he accidentally shot her with the pistol when he was trying to catch himself from falling.

Prosecutor waived death penalty.

1975-183 (1972)
RILEY, KENNETH — MURDER (Life) — CP — 30646 BIBB

SUMMARY: On December 3, 1969, the victim, a bus driver, got into a disagreement over the payment of a 25¢ bus fare with the 15-year-old defendant and a codefendant. The codefendant threatened to get even with the driver. The next night the defendant, the codefendant, and a thrid person waited for the bus, after having agreed that the third person would shoot the bus driver. When the bus stopped, the defendant stepped onto the bus while the third person fatally shot the driver with a pistol.

The defendant gave police an incriminating statement after being arrested; however, at the trial he produced alibi witnesses and testified that he did not participate in the crime.

Trial court imposed life sentence stating that it was the only sentence possible because the defendant was 15 years old at the time of the crime.

Out-of-time appeal granted.

237 Ga 124, 226 S.E.2d 902 (1976)

1975-184 (1975) MURDER 30652
ESSEL, EMORY W. (Life) HARRIS

SUMMARY: On November 29, 1974, the defendant and the victim, who had entered into a business transaction together, had an argument when the defendant accused the victim of taking improper profits. The victim hit the defendant on the head with a pistol, requiring 42 stitches in the defendant's head. The next day the two men drank and played cards with each other. However, that night the defendant fatally wounded the victim by shooting him with a pistol.

The defendant stated that the shooting was accidental.

The court imposed the life sentence stating it was the only possible sentence to impose.

1975-186 (1975) MURDER & Armed Robbery 30669
FLEMING, BRUCE ALLEN (Life) (Life) CP BALDWIN

SUMMARY: The defendant and his father entered into a conspiracy to rob and murder the victim, who was a crucial witness against the defendant's father in a burglary case. On January 26, 1975, the victim, his wife, and two children returned to their home where they were confronted by two armed men - the defendant and his father. The victim and his family were tied up and receipts of over $4,000 from the family grocery store were taken by the defendant and his father. The defendant then shot the victim fatally with a pistol.

The defendant relied on an alibi defense and on misidentification of him by the victim's wife.

1975-187 (1975) MURDER 30676
[illegible], JIMMY (Life) CP FULTON

SUMMARY: On November 18, 1974, a friend of the defendant found him in a bar and asked him to accompany him to an apartment building because he had been beaten up there. The defendant took his friend back to the apartment. The friend went in. Then the defendant saw the victim holding his gun on the defendant's two brothers and on the defendant's friend. The defendant went to his car, got a shotgun, then shot and killed the victim.

The defendant raised a defense of justifiable homicide.

Prosecutor waived death penalty.

1975-194 (1975) AIAA MURDER CP 30726
COACHMAN, CLARENCE (Life) FULTON

SUMMARY: On May 24, 1974, the witness, who lived with the victim, accepted a ride in the car of the co-defendant, Gatlin. The defendant was also in the car. The co-defendant gave his gun to the witness. The victim later argued with the witness about riding in Gatlin's car and took Gatlin's gun from her. The defendant and the two co-defendants then went to the victim's house to retrieve the gun. At the victim's house, the co-defendant Hill shot and killed the victim.

Prosecutor waived the death penalty.

See also 30895
30965

1975-196 (1975) MURDER 30736
GIBSON, ELLIS (Life) CP BIBB

SUMMARY: On September 19, 1974, the sixteen-year-old defendant got in a fight with another boy, the victim, and was beaten up. The defendant went home, waited awhile, then got a gun out of the trunk of the car. The defendant then found out where the victim was and waited for him to come outside. When the victim came out, the defendant fatally shot him.

The defendant raised an insanity defense.

Prosecutor waived death penalty because of defendant's age.

EDWARDS, PAUL DUANE (Life) Domestic CP 63B760 DEKALB

SUMMARY : The defendant and his wife, the victim, had allowed the codefendant to live with them for several months. When the codefendant moved from the defendant's home, the defendant and she kept in contact. On January 30, 1975, the defendant and codefendant met in a motel room and planned the murder of the defendant's wife. The next morning the codefendant shot and killed the victim in her home while the defendant was at the bank.

The defendant denied planning the murder.

Family killing (but planned!)

1975-206 (1974) MURDER & Armed Robbery CP 30774
CRAWFORD, CHARLES (Life) (Life) CHATHAM

SUMMARY: On May 5, 1973, two employees and a third man were closing a tavern. Three young men, one of whom was the defendant, suddenly came into the tavern. Armed with a pistol and a shotgun, the young men took the store receipts, personal money of the third man, and a pistol. One of the employees was shot and killed; the other employee was seriously wounded.

Prosecutor waived death penalty.

1975-208 (1975) Rev'd MURDER 30786
POLLARD, OLINE D. (Life) POLK

SUMMARY: On December 26, 1974, the victim left the bank where he was an officer late in the evening. He was found shot and killed in his car which was found on the road right beyond his residence. The defendant, who was a neighbor of the victim, was convicted of the murder based on circumstantial evidence.

Prosecutor waived death penalty because conviction based on circumstantial evidence.

Reversed because of failure to charge on alibi when alibi was defendant's sole defense and was sustained by some evidence.

1975-199 (1975) Rev'd MURDER CP 30756
MILLS, JERRY JEROME (Life) FLOYD

SUMMARY: The defendant's girlfriend had filed for divorce from her husband the victim. However, the victim was putting pressure on her to live with him again. On December 4, 1974, the defendant and the witness visited a lawyer concerning the situation. The witness then went to the victim's. The defendant bought a gun, then went to the victim's. After a short discussion, the defendant fatally shot the victim.

Judge imposed life sentence.

Reversed because court erroneously admitted evidence of defendant's prior convictions presented by the state.

1975-200 (1975) MURDER 30757
DAVIS, GRADY JR. (Life) CLARKE

SUMMARY; In August 1975, the defendant and the victim got into a fight. Several weeks later on August 26, 1975, the defendant and the victim were in a cafe-store when the victim pointed a gun at the defendant. The defendant went outside to get his shotgun which he had hidden in the bushes. The defendant returned with his gun and fatally shot the victim. The defendant stated that he shot the victim in self defense.

Prosecutor waived the death penalty because he thought there were no aggravating circumstances.

1975-214 (1974) MURDER
FLINT, THOMAS JEFFERSON JR. (Life) 30813
LAURENS

CP Domestic

SUMMARY: On August 11, 1973, the defendant, who had been drinking heavily for two days and who had stolen a pistol the previous day, went to the home of his wife, from whom he was separated. During an argument the defendant choked his wife and fired three shots at her, killing her.
The defendant stated that he shot the victim in self defense as she also had a pistol in her hand.

Family killing while on domestic spree

1975-219 (1975) MURDER 30834
BAKER, BOBBY (Life) DOUGHERTY

CP

SUMMARY: On June 1, 1975, the defendant was asleep in his bedroom when the victim, a friend of his, entered and awakened him. The defendant fired a shot over the victim's head, then fatally shot him in the heart. The defendant told police that he knew that the person in his room was the victim and that he fired at the victim to frighten him.
At the trial, the defendant testified that he did not know who the person in his room was and that he fired to frighten the unknown prowler.

Prosecutor waived death penalty because he thought there were no aggravating circumstances.

1975-220 (1975) MURDER 30837
JACKSON, HENRY L. (Life) CRISP

SUMMARY: On April 19, 1975, the defendant asked the victim to purchase a drink for him. The victim refused, but the two men purchased a bottle of wine and drank it at a club. The defendant left the club, but returned later, drank a bottle of gin, then went outside. He then saw the victim and fatally shot him.
The defendant stated that he shot the victim in self defense because he knew that the victim had learned Karate.

Prosecutor waived death penalty.

1976-1 (1974) Revd. MURDER 30858*
CROWDER, CLAUDE THOMAS (life) DEKALB

Domestic

SUMMARY: The defendant contracted with one Berry in Columbus, Ga. who m he met through a black prostitute to kill his (the defendant's wife) for which the defendant agreed to pay $5000. The defendant left a basement door open when he left for work. His wife was still sleeping or at least in bed. Berry came in, secuted an axe and killed the victim. On the wall was written "death to the rich bitch"
Case reversed because Berry's statement, before he died of self-inflicted gunshot wound as was admitted in evidence.

1976-8 (1975) Affd MURDER A Retrial-Original 30890
RINI, JAMES JOSEPH (life) trial at 30087 [1975-67] HALL
alias JAMES, MICHAEL JOSEPH

SUMMARY: On February 1, 1975, the defendant, the manager of the apartments in which the 16-year-old victim lived, asked his roommate to go get the victim, The defendant borrowed a friend's car and he, his roommate, and the victim drove out I-85. The defendant stopped at the side of the expressway and directed the victim to get out of the car. The defendant and the victim walked down a hill to the edge of some woods where the defendant fatally shot the victim three times. The defendant did not testify.

Trial judge ~~s~~ imposed sentence. Life maximum set by prior trial?

1976-9 (1975) Affd MURDER CP 30895
HILL, ROBERT (life) FULTON
SUMMARY: On May 24, 1974, the witness, who lived with the victim, accepted a ride in the car of the co-defendant, Gatlin. The defendant was also in the car. The co-defendant gave his gun to the witness. The victim later argued with the witness about riding in Catlin's car and took Catlin's gun from her. The defendant and the two co-defendants then went to the victim's house to retrieve the gun. At the victim's house, Hill shot and killed the victim.

Prosecutor waived the death penalty.

See also 30726
30965

...Voyles, and his wife were in their home in Chattooga County, ...a. Ethel Brown, who had been hired to take care of an ailing Mrs. Voyles, ...as also in the home that evening. Mrs. Voyles was sitting in the livingroom and Mrs. Brown was working in the kitchen but was drawn into the livingroom by the commotion. Both were witnesses to the incident and testified to the following: That same evening appellant appeared at the ~~g~~ front door. Mr. Voyles went to the screen door, asked appellant if he had been drinking and informed him that if he had he could not enter the house because of Mrs. Voyles' illness. The appellant began cutting the screen with a knife and forced himself into the house. A scuffle between appellant and Mr. Voyles ensued in which appellant attacked Voyles with a knife cutting him more than once. Both testified that Voyles tried to defend himself with an object which Mrs. Brown described as a "car jack". The scuffle led the two out of the ~~hose~~ house onto the front porch where Voyles reached for an axe lying next to the front door. Appellant wrested the axe from Voyles, knocked him to the floor, placed one foot on top of the victim and with the axe struck the fatal blow to Voyles' head. Appellant claimed he had dated Ekz Ethel Brown add on arriving at the residence he was beaten by two or three men with sticks and has no recollection of events until he was in jail. The mornigg after the killing he surrendered to the police. His clothes contained a large amount of blood. He had no cuts or brusses on him which he claimed to have suffered at the hands of his attackers. CP

James Wesley Bryant - Chattooga - life

1976-15 (1975) Affd. MURDER CP 30924
STOVALL, DAVID W. (life) CLAYTON
SUMMARY: These three rising high school seniors , the Appellant and David Gillespie and Adam Sanchez arranged to have a girlfriend set up a meeting with their intended victim , Tony Doster, at the high school tennis courts. Instead they arrived at the scene in Stovall's station wagon, in which Gillespie and Sanchez were hiding behind the front seat. Stovall backed into the victim's car to stop it, then Gillespie and Sanchez rose up from their hiding place and emptied their respective pistol and rifle into the car, killing Doster. The offense occurred 6n July 4, 1975. They were not arrested until August 30, 1975 as a result of anonymous telephone tips to the police.

236 Ga 840 (225 S.E.2d 292) 1976

See: 30993 and 31003

1976-10 (1975) MURDER 30933
GILLESPIE, DAVID WAYNE CLAYTON
SUMMARY: This case is a companion to Stovall, 30924a and Sanchez 31003 CP
Facts are summarized at Stovall 30924 Blue Card 1976-15

-22 WAYNE
, MILTON
MARY: Appellant, age 74 and married, had been going with Carrie West, victim, a widow woman, aged 60; and the evidence indicated that he had ied Carrie West and was to go to her house around 9 p.m. that night.
However, Deborah West, Carrie's daughter, had come home unexpectedly t night for the week-end, and Deborah did not know of her mother (Carrie) ing any association with Appellant. Deborah West stated that one the ht of April 12, 1974, she and her mother (Carrie) were in the living room tching television, and they were lying on sofas, when they heard someone pping on the window. This was apprentily Appellant coming to see Carrie.
Deborah stated that Carrie told the someone "that they were fixing to go bed and would he please leave" Then about ten minutes later they heard knock at the back door; that her mother went to the back door, opened it; at she (Deborah) heard two shots; that Carrie hollored to Deborah to run de; that Deborah ran to the bathroom and locked the door; and after about ve minutes, Deborah called the shetiff's office.
The incident occurred around 9 p.m. that night, about the time ppellant was supposed to come. Appellant's car was found in the ditch utside the house.
The Appellant claimed accident while defending himself bedause he hought Carrie was going to hit him or hurt him.
His gun fired fatal bullets

State Waived Death Penalty

976-23 Affd. MURDER Armd Rob CP 30951
LDRIDGE, GLEN (life) (3 yrs) BIBB
UMMARY: Mr. Lyell Solar was last seen alive at 9:15 p.m. the evening of Friday, Nov. 22, 1974. Friends testified that during the evening they ere with the Appellant and he was financially broke and having trouble ith his car. He left a group saying he was going to go get some money. e was later in possession of the victim's car and flush with cash. The ictim had a week's pay on him and his ready money card had been used for about $300. On the early hours of Saturday morning the Appellant was waving a gun around and told a girl that "Well, he told me he could blow me away like he did that guy." Dried blood was noted on the Appellant's face. On Sunday, November 24th, police officers went to Appellant's house and found the deceased's automobile.Appellant claimed that he had been picked up by the deceased and two other men known as "Bob" and Ellis", that "Bob" had shot the deceased after an argument, had forced Appellant to get rid of the body, and had left the Nova with Appellant to dispose of. The victim, Mr. Solar's body was found about 150 yards down-river from the point where Bond's Swamp Road intersects the Ocmulgee River. The body was weighted down with a tire and wheel. While Appellant admitted being present when the murder occurred, he denied responsibility of any kind. Once to the police he blurted out tomm that he did it because the victim tried to make a sexual attack on him.

Defendant is at large is at offense?

976-30-SD (1975) MURDER 30965
TLIN, BOB (life) CP FULTON
MMARY: This case is a companion case to Coathman 30726 [1976-30] See transcript and summary there.

1976-31 MURDER CP
GRIFFIN, JOHN PALMOR II (life) 30970 FLOYD
SUMMARY: Mark Stephen Johnson died of gunshot wounds which produced massive hemmorage into his abdominal cavity. The wounds were inflicted on June 12, 1975, by John Palmor Griffin after the appellant and the victim bumped into each other inside the K Mart and the defendant went outside to his automobile, obtained a gun, went back toward the store where the defendant encountered the victim. The defendant asked the victim to go behind the store and fight; the victim declined. There was a scuffle. Thereupon the defendant shot the victim. The victim was not armed.

tate did not seek death penalty

976-34 MURDER CP
LIVELY, JAMES LEWIS (life) 30986 FLOYD
UMMARY: On March 8, 1975, at Buck's Liquor Store, Wenson Dooley was found ad with a severe cut to his throat, a six inch wound causing death.
Dooley and Truman Womack were employed at the liquor store which Womack, odney Browning and Lewis Lively planned to rob. It was to be a heft with an inside man made to appear as a robbery. Wenson Dooley was not rt of this conspiracy. Lively had a knife and said he would cut "that guy' Dooley] Lively shaved hair on his arm with the knife to show how sharp it was
Lewis Lively and Rodney Browning carried Truman Womack to work at ck's Liquor Store between 5:30 and 6:00. This was according to the plan, d later returned to the store. When entering the store Browning d Lively found Womack asleep. Mr. Dooley came to Browning and Lively and ked if he could help them and Lively took Dooley to the back room.
Lively went to get the money and was interrupted by customers coming in. vely tried to get the customers to leave but could not and called for owning to leave and they left. When Browning left the back room d the store he had blood on him and a knife.

ate did not ask for the death penalty

CP

76-35 MURDER 30995
(life) WHITFIELD
RTER, LINDA
MMARY: On Nov 2, 1974 the Appellant stabbed an acquaintance and sometime
val ½ , Judy Nelson to death in a motel room where the victim's three
ar old child was present. Ostensibly this was a grudge because the victim
d allegedly stolen some money from a mutual male acquaintance.

The trial judge took the death penalty issue away from the jury because the
case was based entirely on circumstantial evidence.

76-36 MURDER Robbery 30999
(life) (20 yrs) BURKE
IR, FLEMING JR.
MMARY: On the evening of October 23, 1973, Mrs. Frank Otis, an insurance
lesman, left his home to collect his weekly premiums from his customers.
s badly beaten body was found in a ~~my~~ soybean field two days later. On the
~~xxx~~ evening Otis disappeared, Fleming Nair, Jr. and his ~~xx~~ wife were seen
pping their kitchen. Traces of blood were found on the walls, on a door
ır, and on several sheets in Nair's room, and several pools of blood~~x~~ were
oted outside the back door in addition to a mark, as if something heavy had
een dragged across the yard. A key, nail clippers and flashlight belonging
o Otis were also found in the home. Otis' car, located several yards from his
ody, had a pool of blood in it as well as a butcher knife belonging in Nair's
ome that day, an extension cord to a washing machine in Nair's room and the
victim's tie and glasses. Blood stained blankets were discovered among Nair's
personal effects in Augusta, where Nair and his wife had moved the day after
Otis disappeared. All of the blood proved to be human by the state crime
laboratory and typed as International Blood Group O.

Agg Circumstances Instructed but not found.

976-37 MURDER 31004
ANCHEZ, ADAM ANTHONY (life) CLAYTON
UMMARY: This case transcript at 30924- [1976-15] Case also summarized
here. See also 30993.

CP

71

CP

76-38 MURDER Armd Rob 31008
CKSON, JOHNNY LEE (life) (life) BURKE
MMARY: On the morning of January 21, 1973, the body of Mr. Joseph Allen
: Loach~~x~~ was found at the rear of the IAG Store he operated in Waynesboro,
orgia. He was dead of a gunshot wound to the chest inflicted on Jan.20,73.
John Williams testified that he saw Appellant about 8:00 p.m. on the
vening of the murder. He was accompanied by Willie West. Appellant asked
illiams if he had a bun, and Williams told him he had borrowed one.
Jackson then asked if he could borrow the weapon, and when Williams
greed, ~~xx~~ went and got it from under the seat of Williams' car.
Later, Williams saw Jackson and Willie West leaving the cafe. They told
im they were going to "get Mr. De Loach," and asked him to pick them up in
bout fifteen minutes. He waited for ten or fifteen minutes and then went
o get his friends. When he got to the store he saw Appellant approach Mr.
De Loach and speak with him for a moment. Then a shot was fired and
Appellant ran. Mr. De Loach ran after him, firing two shots during the chase.
Williams did not see any more of the incident. Later that evening, though,
he saw Jackson and West, and picked them up. While they were all together
in Williams' car, West asked Appellant why he had shot Mr. De Loach, and
Jackson replied, "I don't know, man, I messed up."

Death Penalty was not in effect on the date of this offense.

CP

1976-48 MURDER 31084
JONES, HAROLD (life) FULTON
SUMMARY: On the day of her death, July 5, 1975, ~~xh~~ the victim rode with
three friends to an apartment complex so that she could retrieve certain
stereo components. Upon their arrival, the victim began carrying components
from an apartment to the automobile, On the porch, the victim was confronted
by the appellant carrying a pistol. An argument ensued resulting in the firing
of three shots by appellant who immediately fled the scene. The victim was
struck in the chest and died soon thereafter. Neither of the persons
accompanying the victim saw the victim with a weapon, nor did they see the
actual shooting. The thrid did see the entire incident and testified that she
did not see the victim with a weapon, nor act as though she was reaching for
one. Three witnesses for the defense testified that the victim threatened
appellant and just before the shooting reached into her bosom as to reach for
a weapon. Two of the defense witnesses admitted to never seeing the victim
with a weapon. Appellant, his girl friend and her mother testified that the
day prior to the incident, the victim had threatened appellant's life.
Appellant further testified that as he walked out onto the porch the victim
again threatened to kill him and that he fired for fear of his life when the
victim reached into her bosom as to reach for a pistol. Appellant ~~xxs~~
admitted on cross examination that he did not see the victim in possession of a
weapon.

State waived death penalty

6-49 MURDER ArmdRob CP 31110
OUNT, VICTOR HUBERT (life) (10 yrs) CHATHAM
MARY: While their ship was docked in Savannah, three foreign seamen were
bed and one stabbed to death after being carried away in the assailants'
bomobile. The two surviving sailors were in attendance at appellant's
eliminary hearing and testified through a police interpreter. The sailors
stified that as they and the victim left Riley's Lounge they were approached
an automobile occupied by men they had seen earlier that ng night in the
r. Three men jumped out of the automobile, robbed them, forced theird
mpanion into the automobile and drove away. The sailors were unable to
dentify appeallant from a line up, although they did later identify appellant
s one of their assailants from a group of eight photographs. At the prelimina
earing, both identified appellant as one of their assailants and as the one
arrying a pistol. At the trial, Robert Stephens testified that on the
ight of the incident he was sitting in his automobile in the vicinity of the
ar and saw three men engaged in a struggle with the three sailors. He
identified appellant as one of the attackers. The manager of Riley's Lounge
testified that he was working at the bar on the night in question, that he
knows appellant and that appellant was in the bar around 10:00 p.m..
Offense on Nov. 9, 1974.

1976-51 Revd. MURDER Domestic CP 31115
LITTLE, HENRY OLIVER (life) CHEROKEE
SUMMARY: Defendant's confession to police, given after the Miranda warning,
describes the event: "I have been knowing Mary Cagle for approximately ten or
twelve years. We have been staying together about seven or eight weeks, most
of the time in my car. We had a fight about a week ago. This was because she
was dating a Negro. We went to Buck Little's old house around 2:00 P.M. on
May the 21st, 1972 . . . We drank shiskey most of the day. We startedn to
quarrel that evening about her dating colored people. She told me that she
was not going to stop seeing them. We talked about it for a while longer
before I started to choke her. I used my hands and did not put anything arour
her neck. I was sitting under the steering wheel, she was sitting on the
passenger's side. She was still getting her breath when I quit choking her,
then she started gasping for breath for about two minutes before she slumped
over between the front seats. I then drove over to Robert Little's house and
told him what I had done and asked him to call the law."

Death penalty ineffective for an offense tried on this date.
Reversed on instructional error on burden of proof

1976-52 MURDER Armd Rob Mtr Veh Theft 31128
HILL, Larry (life) (15 yrs) (7 yrs) FULTON
SUMMARY: On Oct. 16, 1973 the Appellant and a companion (one other female
remained in the car outside) robbed a Majik Market on Peachtree street and
in the course of the robbery killed the manager of the market by pistol
shot.

This is a companion case to Ross - 31129 [1976-53] CP

NOTE: Jury not qualified as to death penalty and thus issue not given them

976-53 MURDER Armd Rob 31129
OSS, DELORES CORNELIA (life) (15 yrs) CP FULTON
UMMARY:

his is a companion case to Hill 31128 (1976-52]

OTE: Jury not qualified as to death penalty and thus issue not given them

976-57 MURDER 31156
LLER, EVERETT TAFT [Mistrial on Sentence Phase] CLAYTON
MMARY: NO TRANSCRIPT WITH RECORD

CP

5-59 MURDER 31179
ERS, WILLIE JAMES (life) SCREVEN
MARY: This murder occurred on Sept. 23, 1973. Waters had been shot by the
im, Arthur Bryant, Jr., ten years ago, and the two had successfully avoided
h other until this Sunday afternoon. Waters had been gone from home since
urday morning and the family was in need of groceries, so they flagged Bryan
n as he passed on the highway and obtained a ride to the store , where
ers saw them in Bryant's company. When Waters arrived home, Bryant was just
king out of the driveway. Waters grabbed his shotgun and shot at him. Then
ran up the driveway reloading the gun, and took another shot which hit
ant in the back of the head, killing him. Waters' common law wife,
daughter and son-in-law, and three friends who were in the car with Waters
tified against Waters at trial. Waters took the stand in his own defense
claimed he had always been afraid of Bryant and that he thought
ant had a gun and was reaching for it when he shot in self-defense.

ge ruled the only punishment for murder is life in the penitentiary.
Statutory aggravating circumstances instructed or found.

CP

5-63 MURDER 31199
GE, KENNETH WADE (life) CHATHAM
MARY: Around 5:30 p.m., February 23, 1970, the nearly nude body of a man
fatal head injuries was found in a rural area of Chatham County. About
weeks later the appellant's parents, who lived in Florida, called the
l police and told them that their son had told them he had killed a
. They related that their son told them he had met a man in a bar in
nnah and had several beers together, that they left the bar together, and
le in appellant's car, the man struck him and he retaliated by hitting the
with a tire tool several times, thus causing his death. They also
ted that their son said the man's name was May. The Florida police
ified the Chatham County police, who launched an investigation resulting
appellant's arrest and conviction.

death penalty statute not in effect on date of trial [but old one had
yet been found unconstitutional under Furman]

CP

76-64 MURDER 31203
DSON, ROLLEANA (life) FULTON
MMARY: On Sept. 12, 1975 the appellant shot the victim, another female
ice with a pistol on the porch of a duplex house. The victim was visiting
meone in the other apartment an an argument arose ofer whether a named
le had been staying there.

ATH PENALTY NOT SOUGHT

CP

76-65 MURDER 31204
BERSON, CLEMMIE ALBERT (life) BURKE
MMARY: Roberson testified that he shot the victim Hall only after Hall
d twice shot at him, and the defense witnesses generally supported his
ory. The murder occurred Sept. 6, 1975. The state's
tness, Freddie Martin, was a passenger in Hall's car at the time he was shot,
d he testified to a wholly unprovoked killing. * ---- At approximately
:15 p.m. on September 6, 1976, Willie Joe Hall and Freddie T. Martin
re driving on highway 88 approximately one half mile north of Keysville,
orgia. They saw a car, which they recognized as belonging to the Appellant,
rked on the side of the road. Willie Joe Hall drove just past the
pellant's car and pulled over in front of it to render assistance. The
pellant's headlights were on and illuminated Hall's car. Willie Joe
ll opened the car door, and was fatally shot by the Appellant as Hall
erged from the car door.

TE: State did not seek the death penalty -- waived death penalty
(No * circumstances appear

CP

1976-70
SUTTON, WILLIE C. MURDER-2 (life-2) Arson (10yrs) 31218 COWETA

SUMMARY: The Appellant lived in a residence which was consumed by fire on Sept. 24, 1975, soon after Appellant left for work. Firemen later discovered the bodies of appellant's two infant daughters in one of the bedrooms. Expert testimony showed the fire to have been deliberately set; the children died of suffocation prior to the fire; and appellant was the last person to leave the house immediately prior to the discovery of the fire. Further evidence showed the appellant returned to the scene of the fire shortly after the firemen arrived; appeared to be disinterested in the fate of his daughters; and lied to an investigating officerx as to his reason for returning to the house. The record showed the Appellant wanted to return to life with his estranged wife and she, under oath, at first denied, then, under cross-examination by the prosecutor, affirmed she had told appellant the week before the murders that she would not consent to his being with her again as long as "that woman and those children...those children are out there." Appellant was shown to have had the means at his disposal to carry out the fire, and he made incriminating statements in the presence of a friend about one week following the arson.

Note: The State did not seek the death penalty.

CP

1976-73
LEE, ENNIS MURDER 31240 CHATHAM

SUMMARY: Shortly after 9 p.m., August 18, 1973, Herbert Scott was asleep in bed while Agnes Bush, with whom he lived, was preparing dinner in the kitchen. There was a knock on the door and when she went to the door, the person identified by her as Ennis, or Bobby, Lee asked if Herbett Scott was home. She then went to the bedroom and awakened Herbert Scott and returned to the kitchen where she continued to prepare dinner. Within minutes she heard shots fired and ran to the bedroom where she discovered Ennis Lee standing over the bed with what appeared to be a pistol in his hand. At this time she ran out the back door of the house seeking help. Patricia Ann Wade, who lived in the other side of the duplex, called to Agnes Bush and asked what had happened. When told what had occurred, she went to the victim while Agnes Bush entered Patricia Ann Wade's home to call the police. When Patricia Ann Wade arrived at the scene of the shooting, the victim was still in life and in her presence and in the presence of two police officers made a dying declaration in which he identified the person xwx who had shot him. According to Patricia Ann Wade, the victim identified x his assailant as "Bobby" while according to the police officers the victim identified his assailant as "Benny" --- The defenda attempted to establish alibi and used his own testimony and the testimony of a bartender x that he was away from the scene of the crime both before and after the shooting occurred.

1976-72 Revs on Alibi Chg. MURDER (life) Agg.Aslt (10 yrs) CP 31225 HARALSON

SUMMARY: The evidence shows on Feb. 11, 1973, two police officers stopped a pickup truck in Tallapoosa, Georgia, about 1:00 a.m. upon suspicion that the driver "Might be under the influence." As the officers left their vehicle, one from each side, and started forward toward the truck, the driver left the truck, closed the door, and stood there. One officer said, "We'd like to check your driver's license." The driver's right hand "came up" and he started firing a revolver. Shots were exchanged during which both officers were hit. The driver then fled on foot. One officer died the next day from his wounds. The pickup truck was stolen in Decatur the day before the shooting. The defendant admitted he was a car thief. He was a resident of Ohio but was visiting his parents in Heflin, Alabama, about thirty miles west of Tallapoosa. He was identified by a service station in Atlanta as having purchased gas for the truck about 10-1-:30 p.m. the night of the shooting. The surviving police officer a identified him as the driver of the truck, however, he first thought the driver was one "McClain", a psychopathic fugitive about whom he had been alerted. Three cell mates of the defendant while he was confined in jail in Heflin, Alabama, on other charges, testified he confessed to the crimes the defendant claimed alibi and there was supporting testimony for his claim.

NOTE: Ga. Death Penalty not in effect on date of this offense.

1976-74 MURDER Armd.Rob Attempt CP 31263 FULTON
SUTTON, JAMES (Life) (10 yrs)

SUMMARY: On the evening of October 5, 1976, several people were gathered at the home of Mrs. Lil Belcher on Lindsay Street in Atlanta for a gambling game. Buster Berry, one of the participants, made one of the other players a loan against his car. He then called his girlfriend, Rudine Baugh, to come pick up the car and drive it to her mother's house. Rudine arrived about 1:30 or 2:00 a.m., and the game proceeded to break up. As the game ended and the people began to leave, one of the guests noticed some "strange folks" standing near the front porch. One man, who was wearing a trench coat and a dark stocking cap, was later identified as Appellant. Suddenly someone yelled, "robbery" and the strangers enterdd the house. The man identified as Sutton carried a nickel-plated shotgun. Witnesses heard one of them say "Didn's you hear me? Get back in that house. This is a stick up." Then a gun went off and Rudine said, "You done shot me." When the others reached the front door, they found Rudine lying face down in a pool of blood. It was later determined that Rudine Baugh had died as the result of a gunshot wound to the heard. A few days later Atlanta police talked with a Mr. James Moore in connection with the incident. As ax the result of information provided by Moore, they proceeded to a house on Rice Street where they arrested Appellant and three other subjects. On October 7, a lineup was held at the Atlanta Police Department comprised of twelve bx black males. James Sutton was positively identified at the lineup by several people who had been present on Lindsey Street the night of the shooting.

Not the trigger man

78

CP

975-78 MURDER 31273
WELL, MYRTICE (life) FULTON

MMARY: On June 22, 1974, a Saturday, at about 4:30 in the afternoon, fendant ran out of her apartment, came up behind Mr. and Mrs. Thornton o were passing by, and, reaching around Mr. Thornton, stabbed Mrs Thornton her heart. The defendant and her husband had known and visited the orntons who lived in a nearby apartment. Two neighbors who witnessed the lling saw no provocation, but one overheard defendant say after the stabbing, told the dirty bitch I would get her. She told me to kiss her ass." A liceman and x the detective who subsequently dealt with defendant described r as remorseful and normal, except that she asserted the victim was screaming scenities at her window and was harassing her in other ways immediately eceding the killing. One doctor testified that she suffered from schizo- renia and some brain damage at the time of his examination after the cident and that she was an alcoholic. He was unable to give an opinion as to r sanity when she stabbed the victim. Central State Hospital had declared e defendant mentally capable of standing trial. The defendant did not take e stand, but her aunt testified that she had not been "the same" since her rmer husband shot her in the back of her head in 1967.

tate did not seek the death penalty.

CP

1976-79 MURDER ArmdRob 31275
DUHART, LEON (life) (20 yrs) BIBB

SUMMARY: The defendant, a nineteen year old, apparently began his evening of crime between8 and 9 o'clock on January 13, 1975, by breaking into Curtis Ziegler's Cadillac parked in downtown Macon. His fingerprints were didcovered inside, and on the outside of , the passenger door. Ziegler's .357 magnum , blue steel Smith & Wesson was missing. About 11 o'clock, as Mr. William McElroy approached his parked red Volkswagon, a man in a three-quarter length leather jacked, whom the victim later identified from photographs and in a lineup as the defendant, shoved a blue steel magnum pistol against him and demanded his car keys. Since McElroy's wife had them he could not produce the keys and the defendant shot him in the arm, and fired another shot through the windshield. Defendant then threatened Mrs. Wanda McElroy who had just arrived, telling her to get in the car or he'd shoot her also. He took her money, told her to take off her pants and shot her between the legs. He then told them to get out of the car or he'd kill them. They walked about ten feet before they collapsed. A bullet x% recovered from the VW most probably was fired from a .38 or .357 Smith & Wesson, according to the ballistics expert who testified at trial. No fingerprints belonging to the defendant were found on the VW.

A few minutes later, a driver for the A.Y.S. Cab Company was approached by a "wild-eyed" young male who desired to go to the Tindall Heights area of the city. After the driver dx requested a spedific address, the rider changed his mind saying he'd get a less curious Yellow Cab driver to take him to his destination. The victim, a taxi driver A.B. Shirah, who arrived to pick up the defendant at about 11:30 was ultimately found dead of gunshot and robber about three blocks from the defendant's home. One AGG Circum found:Life Sent.

976-83 (1974). Affd. MURDER CP 31290
UDSON, BILL (life) EARLY

UMMARY: On the afternoon of December 13, 1974, Appellant entered the victim's place of business to visit his ex-wife who was employed there as bookkeeper. Appellant was disturbed that the victim was taking his ex wife o Albany for a medical appointment. After some conversation, appellant and is ex-wife went into the victim's office and appellant closed the office oor. Appellant threatened tokkill the victim. Shots were fired. Appellant merged from the office with a gun in his hand and lfet the premises. He was pprehended a few minutes later with the gun still in his possession.

Ntc State waived death penalty-

CP

976-82 (1975) Affd. MURDER Agg Aslt 31289
OORE, ROBERT LEE (life) (10 yrs) FULTON

UMMARY: In the late evening hours of October 23, 1975, Appellant, andx some friends were sitting around the Stop and Go neighborhood store on Richmond treet in Atlanta drinking and having a good time. Appellant asked Mary Ann arks,with whom he had been living, to return home with him. She refused and e fired into the ground with his pistol. Charles King, a customer, stepped ut the front door of the store and Moore shot him in the leg. Appellant said, Man, I'm sorry," "I was shooting at my old lady." After Moore shot King, innie Lee Trice came out of the store and began yelling and cursing at Moore. he told him that her child was inside and that he could have easily shot the hild. Appellant started to walk away, then changed his mind, turned around nd came back. He placed the gun against Ms. Trice's head and shot once, illing her.

NTE: State waived death penalty

...TER, JERRY (life) 04 BARROW

SUMMARY: The victim, Lamar Bentley, resided at Wade's Trailer Park, Barrow ...unty, Ga. with his wife Kathie Bentley. Before his marriage, the victim's ...l resided with his aunt, Ann Dillard. Likewise, at the time of the murder ...ec. 6, 1975., Appellant resided with Ann Dillard, who was also his aunt.

Following a drinking party a domestic argument apparently erupted betweer ...he victim and his wife. After some time of off and on fussing the victim ...as told by Ann Dillard she would obtain an an arrest warrant charging the victim with beating his wife. The victim stated to Ann Dillard that he ...as going to blow her brains out. He had no weapon. Appellant got ou t of th ...ar and pushed and apparently struck the victim in the chest with his left han ...The victim backed away from the automobile and the Appellant drove away. The ...victim had been fatally stabbed.

...OTE: State waived death penalty

1976-90 (1975) Affd. MURDER 31318
...URNETT, ROBERT EARL (life) POLK

SUMMARY: Two young boys testified that they were standing near a dumpster ...n in Cedartown, Georgia on April 20, 1975. As Appellant was enptying his garbage, Mosris and another man drove by in a car. According to the boys, there were no words spoken by either of the men. Jones got out of the car and Burnett walked over to him and shot him twice. The boys testified that Burnett always wore his gun around the project, and that he had threatened to shoot several of the children's dogs. The driver of the car heard Morris say something to Burnett about keeping the gun away from his kids. Another witness said she heard Burnett say to Morris "Leave me alone" Appellant testified he was threatened by the deceased Morris.

...TE: The state waived the death penalty.

1976-107 (1975) Affd. MURDER Armd Rob(4) 31398
TUCKER, ANITA JEAN (life) 1-1 yr 3-20 year each GWINNETT

SUMMARY: Anita Jean Tucker was jointly indicted along with Michael Davis and Sammy Kennett for murder and four counts of armed robbery but she was tridd separately. The offense occurred on Oct. 9, 1975. The Appellant had been trying to arrange a meeting with the victim through a friend for the purpose of buying cocaine. The money was not forthcoming and these efforts were abandoned. Her co-indictees overheard appellant and had her take them to the victim's apartment so that one of them could get a "fix." Only Davis went in and while in the apartment, he noticed large sums of money lying around. After he obtained the "fix", the plot to rob the victim began to hatch. Guns were obtained and appellant drove Davis and Kennett in her car back to the victim's apartment at about 4 a.m., dropped them off and went to a nearby Waffle House Restaurant to wait. Davis and Kennett forced their way into the victim's apartment, robbed and killed him and also robbed three other occupants of the apartment. Davis and Kennett w then went to the restaurant and departed the scene in Appellant's car.

NOTE: STATE WAIVED DEATH PENALTY

CP

1976-108 (1975) Affd. MURDER 31407
BOLDEN A/K/A BOLTON, Charles L. (life) NEWTON

SUMMARY: The Appellant with William Turner were partners in a check fraud scheme. They moved to Monroe, Ga. and leased the "Upper Room" Elks Club in Monroe with the agreement that as part of the arrangement Joe Graves, who was managing the club, would be allowed to remain as manager under Appellant's lease. Graves had invested in fixtures in the club and after much disagreemen the two partners agreed to pay him $1600.00 for everything. Bolden talked of "getting rid"of Graves. They never paid Graves. On Friday night Feb. 7, 1975 the club did not have enough money to pay the band. Graves agreed to go get the money. He subsequently met the others at Appeldant's house in Social Circ a. Appellant, Graves, and Truner left the house in Graves' car around 4 o'clock a.m. supposedly to distribute some bootleg liquor. Graves was driving the car. Appellant told Turner, "Pal, you ride up front," so Turner sat in the front seat with Graves, and Appellant got in the back seat. Approximately a quarter of a mile from the house Appellant shot Graves in the head several times with a silver, nickel-plated .32 pistol. on Feb. 8, 1975.

...TE: STATE ABANDONED REQUEST FOR DEATH PENALTY(because of the difficulty the jury had with the verdict.)[time]

976-110 (1975) Affd. MURDER CP 31418
TKES, CARL DAVID (life) DEKALB
MMARY: Carl Tukes and a companion, Ricky Burdette, on March 25, 1975, ntered a U.S. Service Station on Candler Road in DeKalb County, Georgia, bout 10:15 p.m. and demanded money from Ms. Doris Rousey, an employee, She reamed and fell to the floor. James Whitten, an attendant, appeared at a ear door of the station with a handgun and Tukes shot several times, killing hitten with a bullet in the face. The robbers fled, taking no money. Tukes et Byron Henderson on a bus about an hour later; made several incriminating tatements to him and offered to sell him a pistol he was carrying. The next orning, Tukes admitted to Henderson he had killed Whitten. Henderson , an nformant for the police, told them this information and that Tukes had told im if he wanted to buy the pistol, it would be at his residence or that of icky Burdette's. A warrant was issued upon probable cause for a search of the wo houses. The gun and two articles of clothing set forth in the warrant were ound in Tukes' house. During trial, Tukes was positively identified by s. Rousey as the robber who accosted her and killed Whitten. Henderson estified for the State.

OTE: TE STATE WAIVED THE DEATH PENALTY

976-115 Affd. MURDER Burglary CP 31454
ERDON, OTIS &Dennis L.Brooks(life) (15 yrs) MUSCOGEE
MMARY:On Friday, Feb. 21, 1975, the victim was found dead in her home. She s lying by a chair on the floor in the room where she normally sits. Her ther's body had apillow case over its head with a stocking tied around the se of the pillow case; its arms were tied behind its back with stockings.
A gun was missing from the home. Death was caused by cardiac failure du o hemorrhage and infraction of the right atrium or the right auricle region o he SA mode pacemaker. She had a bruise on the left side of the head near the emporal region and multiple abrasions. Ligature marks or circular depressions ere obsereed on the right forearm and left wrist of the body. A medical itness, the medical examiner concluded that the beating of the victim was the irect cause of the victim's heart failure. Brooks' statement was as ollows: He, Appellant, and a man known as Dirty Red entered the victim's home or the purpose of stealing. Dirty Red tipped up behind the woman and held er while he (Brooks) brought some stockings and a pillow case to tie the oman. Then he and Appellant searched throughx the house for something to teal. After leaving the house, Appellant gave Brooks a dollar in change hich he had taken from a drawer in the victim's house. In his statement, ppellant admitted burglarizing Ms. Lewis' house. Hex also admitted that the urglary occurred at the same time that Ms. Lewis was tied up.

Jarrells.

tate did not seek death penalty

CP

1976-111 (1975) Affd. MURDER 31427
BROWN, PAUL EUGENE (life) BARTOW
SUMMARY: On the morning of Sunday, Sept. 7, 1975, the body of Charles Wesley Brown was discovered in his home. The cause of death was determined by the County Medical Examiner to be a gunshot wound and the time of death was fixed s occurring between the hours of 5:00 - 9:00 p.m., on Saturday, Sept. 6, 1975. The Appellant, Paul Eugene Brown, a son of the decedent who lived with his father was arrested approximately 1:05 p.m., Sunday, September 7, 1975 while in n intoxicated condition. At the time of his arrest the Appellant stated to the arresting officers that on the preceding afternoon he had been at home drinking and watching television and that his father, upon returning home had ordered him to leave home because of his drinking; a struggle ensued over a telephone, and subsequently, when the decedent brought his shotgun into the room appellant and decedent struggled over the shotgun, and after appellant had secured control of the shotgun it discharged. According to this testimony the Appellant left the scene, returned and then determined his father to be dead; he attempted to wipe the shot gun clean and left the scene again. He was arrested on Sunday afternoon in the vicinity of the home occupied by appellant and his father.

TE: State did not seek the death penalty.

CP

1976-117 (1975) Affd. MURDER Agg. Aslt. 31457
LEE, JOHN DAVIS (life) (10 yrs) RICHMOND
SUMMARY: The State presnnted evidence to show a that pn June 21, 1975 , the Appellant became embroiled in an argument over $2.00 at the 2160 Club in Richmond County, Georgia; was pushed around and left with his cousin togo to his aunt's house and obtain a .38 caliber pistol. He returned to "straighten things out. . ." He renewed his argument with Brown and when Hudson pushed Appellant toward the door in an effort to break things up, the appellant seized the pistol from his cousin and shot Hudgon. Appellant followed Hudson as he crawled toward a nearby restroom and there shot Laverne Thomas, emerging from the restroom, in the shoulder. Appellant fled-----In narrating what happened, the appellant testified, " . . .That's when I turned around, you know, and saw Elbert coming after me. So, I snatched the gun from Hang Hunt and turned around and shot him..." Appellant pleaded self-defense.

THE STATE WAIVED THE DEATH PENALTY

CR 87

976-118 (1976) Affd. MURDER Armd Rob 31462
ENIOR, TOMMIE LEE (life) (life) MUSCOGEE
MMARY: Fred M. Daugherty, the victim, was employed at the Linwood Bottle hop, 718 Linwood Boulevard, Columbus, Georgia. The Bottle Shop was owned by r. Thadd Mulkey. Appellant, a part-time employee at the Bottle Shop had been ired approximately three weeks before the murder because the owner believed hat he was pilfering the cash register. Appellant's experience as a part-tim mployee, provided him with the knowledge of where the money and weapons were ept in the store. The victim was killed by two wounds caused by shotgun blasts. After his his arrest and appropriate warnings, the Appellant informe the officers that he went to the Bottle Shop in order to speak with Mr. Mulkey egarding his tax forms. Mrs. Mulkey was not present and the victim informed Appellant that he should leave the premises. An altercation ensued at which time the Appellant, knowing the location of the weapons kept in the store, btained the shotgun and fired in the victim's direction. He was not sure whether or not the shotgun blasts struck the victim so he removed the money from the cash register in order to create the a]pearance of a robbery.

STATE DID NOT SEEK THE DEATH PENALTY

CP

1976-119 (1975) Revd (Jury Makeup) MURDER 31471
SANDERS, ROSA MAE (life) WARE
SUMMARY: The victim appeared to be the common law wife husband of the appellant. There was evidence the appellant believed the victim was running around on her. There was testimony from two witnesses that they heard a screen door on the front of a house slam open and a gun fire. They looked and saw the victim falling to the ground. Tppellant was observed coming down the steps of the house trying to recock a rifle. She told one of the witnesses, "I told Mitch Lee [the victim] if I ever caught him . . . over her, I'm going to kill him." Upon the arrest of appellant and a waiver of her Miranda rights she stated, "I don't know why I shot him. I just did."

State did not seek the death penalty

[1976-1.1 (1971) Affd. MURDER CR 31489
PIERCE, WILLIAM J. JR. (life) Jeff Davis
SUMMARY: On January 22, 1971, Sheriff Marcus Hall of Jeff Davis County received a phone call from Homer Wilcox reporting that his wife, Helen, was missing from their country grocery store. The sheriff himself had visited he in the store only an hour earlier, but a search of the immediate area failed to reveal any evidence of her whereabouts. Search parties were formed to coml the area on the following two Saturdays, but no clues were found. Attention was focused on the defendant, under arrest in another county, and after proper warnings and interrogation he told Sheriff Hall he wanted to show him where the body could be found, and that he had killed her by shooting her. After about an hour and a half search, the group did locate her body, and the defendant was driven back to Swainsboro. The Appellant subsequently narrated the course of events leading to the strangulation, rather than shooting, of Helen Wilcox arising from her resistance to leaving the grocery store with him after he robbed the store with a gun. In a final interview a month later he told the sheriff where to find the victim's pocketbook and a Calvert bottle. The sheriff located these items as described by the defendant

Note: Current death penalty not in effect at time of offense or trial.

Domestic

1976-126 (1974) Affd. MURDER 31500
STAYMATE, CHERYL ELIZABETH. (life) BIBB
SUMMARY: The victim"Jamie" Staymate, age 23 months died on April 17,1974 of head, chest and abdominal injuries which were all traumatic in natude. In s short, the child's death was attributed to his receiving multiple injuries. This was a battered child syndrome death.

State sought death penalty - hung jury - judge imposed life sentence.

ITE, EDNA (Evid Insaff) (life) O'BALDWIN
MMARY: On Dec 24, 1975 the devendant passed a male fetus from her body commode at GCIW in Baldwin County Ga. The evid. supported the state's ntention that the appellant was the mother of the newly born child found ad in the prison bathroom; the evidence was insufficient, however, to how that the infant ever achieved an independent and separate existence from ts fm mother.

State did not seek the death penalty.

CP

Domestic

1976-138 (1975)Affd. MURDER 31574
TUCKER, CHARLES FRANK (life) FULTON
SUMMARY: About 12:02 a.m. on January 4, 1975 Mrs. Tucker the victim left her job in the presence of two co-workers and got into a car identified by one as that of her (the victim's) husband. About 15 minutes later, the victim was found dying, by Officer R.E. Davidson of the Atlanta Police Dept. When Officer Davidson arrived at the crime scene, he was met by Appellant who state fairly calmly, "Officer I shot my wife. I think she is dead." Appellant gave the officer a .38 caliber pistol from one of his front pockets. Appellant was ot in custody at this time. The victim was found to have sustained several injuries. Her body was in a crouched position some four or five feet from her purse, which contained a pistol. Two holes were observed in the wall behind the victim's head. It was also observed that the victim was shot once in the throat and once in the upper left side of the head. There also appeared bo be a laceration to the upper right side of the victim's head.

Appellant mx told the jury that he had killed his wife while he was frightened. He stated that after he and his wife returned to their residence, they discussed there domestic problems. He claimed that he than told the victim, "If you don's come back, I'm going to get me a roommate." The victim allegedly responded, "Guesss I'll have to kill you." Appellant claimed that he then went upstairs and as he came back down, he saw the victim getting up from the couch on which she sat with a gun and stating, "You don't think I'll mx kill you, do nx you?" Appellant stated that he then became frightened and fired his revolver.

NOTE: mx This was a family killing - the state did not seek death penalty

976-141 (1977) Affd. MURDER (life) CP 31530
'Antignac II, Donald Emmett. RICHMOND
MMARY: The Appellant was charged with the murder of David Dunn on the night f December 26, 1974. Evidence produced at the trial showed that the appellan nd an accomplice, Taylor, drove with the victim to a deserted area of ichmond County, and there the appellant levelled a sawed-off shotgun at Dunn nd fired at point-blank range killing him. An autopsy performed on the body f the victim revealed that probable cause of the death was three shotgun ounds. The body of the victim was discoverdd at 11:15 p.m. on the same vening by two patrolling deputies of the Richmond County Sheriff's Dept. he officers discovered Dunn's body lying on the ground near his deserted car. ne of the officers testified that there were two sets of footprints, one of hich led up to the body. There was a large amount of blodd in the car and n the ground. After an interview with the victim's wife, the officers earned that Dunn was last seen leaving the house with the appellant and Taylor arlier in the evening. The officers went to Taylor's house and then to the ppellant's who lived next door. Appellant's car was parked outside under a street light. Looking into the car, the officer was able to see the breach of a shotgun, a .38 caliber pistol, and a pair of black gloves. The offecers went nto the appellant's house to talk with him and ask his permission to look into the car. With his permission they ppened it with a coathanger. AS they were going outside to open the car an officer saw - tennis shoe with a stai n that ppeared to be blood. They arrested the appellant. Another testified they ad been hirdd to kill Dunn. Dunn's widow denies she made any agreement with hem to kill her husband. Appellant testified he was there but Taylor, one of his companions shot Dunn because of a misunderstang between the two men.

CP

1976-142 (1976) Affd. MURDER (life) 31590
RAMEY, GORDON . STEPHENS
SUMMARY: The victim's daughter testified that on the night of the slaying she overheard a telephone call in which the appellant requested an urgent meeting with the victim (his uncle). The victim agreed to meet the defendant at 8:15 p.m. "or a little after" a shooting was witn4ssed in a parking lot at Tumsey's store. The witnes s observed two cars. A white or light colored compact was parked three or four feet in front of a station wagon. He saw a man run toward the rear of the station wagon, and a shot rang out. The running man gasped, and fell at the rear wheel of the station wagon and began attempting to crawl under the car. The assailant approached the victim and fired at least one more shot. The assailant fled in the compact car. There was evidence that appellant drove a white compact car. Sherxxxxxxxxxxxxxxxx Later that evening, appellant left a seven millimeter bolt-action mauser rifle with his brother-in-law. Axxxxxxx A seven millimeter cartridge case was found at the scene of the crime. Expert testimony established that the cartridge was xkxx fired by the rifle. The bullet taken from the victim's body was fired by xx a seven millimeter bolt-action mauser rifle, but because of the condition of the rifle barrel, it was not possible to establish whether or not the bullet was fired by the particular rifle in question.

1976-143 (1976) Revd. MURDER Att.Armd.Rob. CP 31593
JOHNSON, J. WAYNE (life) (10 yrs) KENTON

SUMMARY: The incident which led to the charges began on Feb. 7, 1975. J. Wayne Johnson ~~xxx~~ had lived for years near Harmon H. Nolen's store. Nolen lived alone in a house nearby, and was reported to keep large amounts of cash on his person and at his home. He was seventy-nine when he died.

On the evening of February 7, 1975, Johnson attempted to recruit Terry Harper to assist him and ~~Timmath~~ Timothy Hall in robbing Nolen. Appellant had mentioned this subject some weeks before, but had not brought it up again until that night. Harper refused to go. Johnson had been firm that he could not go in the Nolen premises, presumably because Nolen would recognize him. The next day, which was February 8, Johnson told both Harpers (who had heard of the beating of Nolen occurring the night before) that he had let Timmy Hall and Terry Day out at Nolen's house to ~~xxx~~ rob him, while he drove around, and then picked them up. They failed to get any money. Nolen was badly beaten and died from complications from his injuries on February 23. The Harpers did not relate their information for nearly a year. After the ~~Harpers~~ Harpers' information implicating Johnson, Day and Hall was received, investigators talked to and obtained a statement from Hall concerning the instant offenses. Hall was then in Leidsville pursuant to his conviction for an intervening offense.

Case reversed because Appellant ~~xxxxx~~ statement to officers and details of negotiations for a plea of guilty went before the jury + confession based on offer of substantial amend ~~xx~~ 20 years.

1976-144 (1976) Affd. MURDER CP (Domestic)
RICHARDSON, JERRY (life) 31595
STEWART

SUMMARY: The victim Calvin Greene, resided on Greengrove Road in Stewart County, with his wife Thelma Greene~~s~~ and their nine children. The Appellant, Jerry Richardson, and Mary Richardson Young, are children of Thelma Greene by a former marriage. These two step children of the victim, resided in Columbus, Georgia. Subsequent to a domestic quarrel on the evening of November 24, 1975, Calvin Greene put his wife out of the house, and would not permit her to return. Thelma Greene called her children, living in Columbus, to come down to Steward Coounty and get her. Between 10 and 11 o'clock p.m., Mary Richardson Young and the Appellant arrived at their mother's house and found her waiting outside in a car. After talking briefly with their mother, the Appellant and his sister went into the house, where a conversation ensued between the Appellant, his sister and the victim, Calvin Greene. The Appellan asked Mr. Creene's permission to take his mother back to Columbus and discussed getting a divorce. Mr. Greene stated that he did not care and that there was no divorce to get. ~~xx~~ An argument ensued with the victim attempting to hit Priscille Green and culminated in the Appellant firing seven shots from a 25 caliber pistol at the victim, five of which hit.him.

Domestic fight

1976-147 (1977) Affd. MURDER (2) Domestic 31624
BURGER, BOBBY GENE (life)(2) FARMIN

SUMMARY: It is undisputed the Appellant gunned down his wife, Sandra Burger, and an acquaintance, Carl Brooks. Appellant, a part-time painter and weekend evangelist, was married to Sandra Burger; and they had three children ages 5, 4, and 3. He began to suspect his wife was having an affair. He discover she was not at the dentist's where she claimed she would be, and Appellant ~~xxxxx~~ checked the mileage on her car in an attempt to determine where his wife went. On October 4, 1975, Mrs. Burger had rented an apartment from Charles Humphrey, and in the afternoons Charles and Mary Humphrey had seen bo Mrs. Burger and Mr. Brooks at the apartment in McCaysville. On the morning of October 25, 1975, Appellant related his suspicions to his friend, Reverend Walter J. Spurling. He told Rev. Spurling that if Appellant caught his wife in the act of adultery, he would kill her. Appellant also stated that he wou have the "privilege" to kill his wife and her lover. At approximately 9:30 a.m. Appellant went to the home of Robert "Oscar" Cross, who lived one-half mile away. Mr. Cross owed Appellant some money and to pay off the debt, Cross gave Appellant an unloaded .22-caliber pistol. Later that same morni Appellant's daughter told him that her mother took the children to a "little brown house," where Mrs. Burger went in alone. He asked his daughter if she could find the house, and when she replied yes, Appellant put the children in the car and went look ing for the house. After his daughter pointed~~x~~out the apartment, Appellant knocked on the door and then went in. He saw hiswife and Brooks~~x~~ and although they begged Appellant not to shoot, he began firing. He killed both of them.

1976-148 (1977) Affd. MURDER
SMITH, BRIAN ERIC (life) 31632
FULTON

SUMMARY: The appellant was seventeen years of age at the time of the homicide He and seveeal other persons ~~x~~ were at the apartment of David Stephens. Paul Eugene Baker and his brother, Barney Roy Baker, drove into the parking area of the apartment about midnight, expecting to attend a party there. Stephens, whose apartment was on the seo~~x~~nd floor, came out his kitchen door and asked who it was, and when Barney Baker gave his name, Stephens said, "That's all right." The shot which killed Paul Eugene Baker was fired by appellant just as Stephens finished speaking. The only witness for the State who was in Stephens' apartment when the homicide occurred was James Parrott. He was 17 years of age. He testified that: He had been at the apartment for several hours prior to the homicide, and had seen three guns in the apartment. A rifle was lying on a sofa. When a car was driven up to the apartment area, Stephens went to the kitchen and the witness followed him. He saw the appellant pick u the gun from the sofa. When he heard a shot fired he looked in the living roo and saw the appellant sitting in a chair in front of the window with the gun i his hand. The appellant said "I shot him." Appellant claimed accident The offense occurred on Sept 21, 1975

976-151 (1977) Affd. MURDER 3164
ILLIAMS, WILLIE JAMES (life) BALDW

UMMARY: The body of 74 year old Mrs. Frances Herrin was found on the ack porch of her home on April 14, 1973, about 7:30 p.m. She had been trangled to death. A few days later police learned that two diamond ings and a wedding band had been pawned by some boys. The pawn ticket ore the name of John Williams, older brother of the defendant. The olice went to the Williams' home and asked and received permission from th arents to talk with the boys and search the house. They took the boys to he pawn shop where they picked up the rings and then to the police station or questioning. John Williams was interrogated first. He made a statement ncerning connecting the defendant with the rings. At this point the efendant, who was 14 years old, and his parents were informed of his rights nd the nature of the possible charges against him. Both the defendant and is parents xisg signed a waiver of counsel. The defendant then confessed o the crime in the presence of hss parents and law enforcement officers. he next day the police took the defendant to Mrs. Herrin's house and e showed them how he had entered, the bureau where he got the xigx rings, nd where Mrs. Herrin was when he strnagled herg.

Court says could not impose death sentence on def age 18.

976-154 (1977) Revd. MURDER 31672
EDDISH, DONALD LEE (life) WAYNE

UMMARY: Jewrice Roberson was found dead of a gunshot wound to the head n his retail store in Wayne County, Georgia on December 3, 1974. Appellant as subsequently arrested for the killing pursuant to a warrant issued on ec. 10, 1974. On Jan. 10, 1975, he made a taped statement accusing co-def. arham, stating that he had been with Barham immediately prior to the illing, that he knew Barham intended to kill Roberson, that he tried to talk arham out of it, that he left town with Barham after the latter returned from oberson's store, and that he accepted part of the money which Barham brought ack from Roberson's store. Appellant denied any involvement in the planning f the crime or any participation therein. Barham was taken into custody nd made a teped confession the following day. He stated that hg both he nd appellant had entered the store with the express intention of killing oberson, that appellant had done the actual shooting, that they had bgen then emoved approximately $600 from the victim's cash register, and that he and ppellant had spent the remainder of the day and night together engaged in arious pursuits. The two defendants were then bxagx brought together , and he tape recordings of their statements were played to them. Barham then epeated his accusation that both he and appellant had gone into the store nd that the appellant had shot Roberson. According to the xnxsxigaxionx heriff the appellant admitted that he had in fact done the shooting.

Both Sent to life

976-1955 (1977) Affd. MURDER 3167
ITCHELL, RUBY (life) CLARK

UMMARY: On March 4, 1976, at about 8 p.m., police officers responded to a adio call regarding a shooting at Cunningham's Cafe. A man who had been s as found lying dead on the floor; he was identified as Wesley Mitchell, th ppellant's husband. At 11 p.m. that evening, Officer Ingram received a ph all from Appellant asking him to come get her. Upon his arrival, Ingnam w old by Appellant that she "didn't want to do it" but she "had to." Ingram estified that she handed him her purse which contained a loaded .32 pistol ngram removed the cartridges and took Appellant to the police station.

The murder was a culmination of long standing domestic differences oft unctuated with mutual shootings and cuttings of one another. On this ccasion the dispute apparently revolved around the victim's oppositio n to ppellant's plan to move to Atlanta.

Both Appellant and the victim worked at the Cafe.

CP Domestic.

tate did not seek the death penalty.

976-157 (1976) Affd. MURDER Armd Rob 31681
VERETT, JAMES REGINALD (life) (20 yrs) MUSCOGE

UMMARY:

SEE SUMMARY AT Harris 30274

CP

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1976-158 (1977)Affd. MURDER 31683
KING, EDWARD JAMES AKA KING,PETE (life) MONROE
SUMMARY: On Oct. 12, 1975, the day beofre the homicide Dorothy Reen Jackson the woman with hom the deceased lived testified that : There was a dispute between the appeldant, his brother, and the deceased Billy Joe Jackson. The Appellant came into the home of the witness and the deceased,stating, " I com in just like I said I would. I said I'd come in and I did. Since I'm in, I'll walk down in the kitchen and walk back out." The witness told the appel land, "I asked you just only one time to get out of my house." and he made one step toward the kitchen, whereupon she shot down between his legs. The appellant kept standing there, just looking at her, and she tried to shoote again but her gun would not shoot. The deceased then pulled out his gun and shot behind the appellant, and the appellant went out. She heard the appellant outside saying, "I'll go back in there, I'll go back in there." She saw the appellant the next evening, about 8:00 p.m., standing outside the door with a gun. She heard the deceased tell him, "Go ahead one, now, Pete.' The Appellant replied, "No, I told you I was going to get you." She looked down and saw that the appellant had a gun. He was standing on the porch outside the door. The deceased reached out to "get the door" and the appellant threw up his gun and shot the deceased.

CP

1976-160 (1977) Affd as to Murder MURDER Crim Attempt-ArmdRob 31693
FARLEY, Michael [alias Dog Farley] (life) (10 years) MUSCOGE
SUMMARY: This case involved a shotgun killing of a filling station attendant during an attempted holdup of a filling station. The evidence showed that the defendant was a party to the attempted armed robbery but was not the actual perpetrator of the murder.

CP 95

1976-163 (1976) Affd. MURDER (life) 31701
BRADBERRY, LEONARD [alias Lenon Bradberry]
SUMMARY: On October 31, 1974, at the Sand Hill Bar, Sergeant Reese Lane was asked by Theodore R. Jackson for a ride home because his clothes were muddy and dirty. Sergeant Land had known Jackson when Jackson had been in the Army. After arriving at Jackson's apartment, they had a few minutes of conversation in the car, according to Lane's testimony. As Jackson opaned the rear car door to leave, an arm came through the window or door, pulled the door open, and Lane saw a flash and heard a shot. Lane stated that Jackson fell out of the car. Lane got out and lay nd down by the side of the car. Lane testified that he heard someone running away and, looking under the car, he saw a figure running between some apartment complexes. According to Lane, the arm reaching in the car had been that of a black man. Jackson was bleedin from the head and police were called. A passerby, Carrie Phillips, testified that in the early morning hours of Rau November 1, 1974, she saw a car pull up beside an apartment building, then a man opened the car door on the passenger side and shot into it. Ms. Phillips stated that the man who had shot then ran away; she noticed he wore dark pants. Jackson died of two gunshop wounds in the head, eigher of which could have caused death.
Earlier in the evening Appellantxxas the victim was seen to hit the appeldant. Later she Appellant, with blood on him asked Lane to xix drive him home. He left the bar followed by Appellant and someone else. Appellant was dressed in a flowered shirt and dark trousers. Appellant was arrested under warrant on November 1, 1974. Appellant told officers "I done it" Hix He indicated his bruised face and swollen lip. He said he had thrown the gun off the 14th street bridge. Appellant left down before trial. Denies guilt.

1976-161 (1977) Affd.for-MURDER (2) Armd Rob (2) Burg.(2) 31694
REED, CHARLES DAVIS (life)(2) (life)(2) (20 Yr)(2) JEFFERSON
SUMMARY: This is a companion case to Birt and Gaddis (death cases) See summaries there.

13: Not tied in as closely as others

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CP

1976-165 (1977) Affd. MURDER 31731
BRILEY, NATHANIEL WAYNE (life) CLAYTON

SUMMARY: The Appellant was charged with felony murder in the death of Charles Bohannon, Jr., a two year old child on Aug 23, 1975. The indictment alleged that appellant, while in the commission of a felony, i.e., cruelty to children caused the death of the infant by beating him with his hands. The jury found him guilty as charged and also found that the murder was "outrageously and wantonly vile". The cause of death was determined to be due to "blunt force head trauma." The medical examiner testified that death could have resluted from either (or both) of two head injuries, one located on the top of the head, and the other on the xxxx side. The mother of the child testified that appellant struck the child in the head with his fist three days before the death of the child. The medical examiner estimated that the blows to the head, which caused the death of the child, occurred approximately 72 hours before death. There was also uncontradicted evidence before the jury that the child fell and struck his head on an automobile bumper around the time frame within which the fatal blows xxxx were struck. The only testimony which links the appellant with the head injuries suffered by the child was that of the mother. The mother admitted that prior to the trial she had made several statements to police and neighbors to the effect that the bruises which the child had were due to falls.

N.B. Jury found stat. agg circumstances but did not impose death penalty.

CP

1976-166 Affd. MURDER 31733
LINGERFELT, JAMES (life) FORSY

SUMMARY: This is the third trial of the defendant James Lingerfelt for the murders of William Cantrell and Larry Lee Mulkey.

See Prior Summaries at Lingerfelt v. State, 231 Ga. 354 (201 SE2d 445)(1973) # 28240 & Lingerfelt v. State, 235 Ga. 139 (218 SE2d 752)(1975) # 29764

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CP

1976-168 Affd MURDER 31754
BROWN, FRANK EDWARD (life) CHATHAM

SUMMARY: On Jan. 17, 1976, appellant and the victim, both of whom had been drinking, were engaged in a knife-fight that resulted in the victim being stabbed in the heart. He died shortly thereafter from the wound. The appellant contended at the trial that he was defending himself, that he took the knife from the victim, and though he cut him, he did not intend to kill the victim.

CP

1976-170 Affd. MURDER 31762
CROMER, CHARLES EDWARD (Life) BARTOW

SUMMARY: In a nightime altercation in the back yard of relatives of his estranged wife on Aug. 29, 1970, Cromer killed one sheriff's deputy and wounded another when three deputies sought to arrest him pursuant to a peace warrant and a telephone call reporting a disturbance. Both surviving officers testified that deputy Holloway announced to Cromer as they approached with flashlights they were deputies with a warrant for his arrest. Holloway testifiid that Cromer then swore at them, "You are not going to take me any damn where, you son of bitches." Cromer's wife threw her arms around Cromer; his hand came out of his pocket with his gun, and he began shooting. Two deputies grabbed him. Cromer made every effort to "line up" his weapon on the officers as they struggled to control his gun arm and jam the weapon. Deputy Holloway testified to Cromer's firing at least four shots. Deputy Morris testified that they second shot felled the deceased Deputy Simpson (who was shot through the heart) and the third hit him, Morris, in the left temple after which he remembered nothing. Holloway eventually disarmed Cromer. Cromer's unsworn statement waw that he had been drinking over a period of several hours; that he had the gun in his hand more or less by accident as the men approached; that they did not announce themselves and he thought they were his wife's relatives; that the gun fired by accident when his hand was grabbed and he never intended to point it at anyone.

The victim's name was Boyd Simpson

-174 Affd. MURDER (life) CP 31806
LLIPS, THOMAS E. COFFEE

ARY: Also covered are 31851 and 31 852 On January 19, 1976 the
nse occurred. The appellant stomped and kicked the victim Charles
el Merritt to death in a fight apparently casused by the belief the
tSm stole $300 from the appellant. The killing occurred in the
tim's home. All had been drinking the night before and the appellant
spend that night and the previous night at the victim's home.

: State waived death penalty

1976-180 Revd. MURDER (life) Armd.Rob. (20 yrs) CP 31823
LANE, JERRY RAY BARTOW

MMARY: The appellant was jointly indicted with Michael Gene Berryhill.
On his separate trial Berryhill was convicted and given the death penalty.
His convictions were affirmed in Berryhill v. State, 235 Ga. 549
(221 SE2d 185) (1975)-See card at 30173-Berryhill was the actual perpetrator
of the murder and armed robbery. The evidence in the present case authorized
a finding that the appellant and Berryhill conspired to commit a burglary;
they went to the home of the murder victim, and when he refused to open the
door, Berryhill shot into a glass beside the door and opened the door, and
thereafter shot the victim and robbed his wife; when Berryhill shot, the
appellant fled the scene, returned to the car in which they were riding, and
went to his home. It is the appellant's contention that he tried to persuade
Berryhill not to go to the home of the ~~x~~ murder victim because it appeared
that the occupants were at home; Berryhill told him that he would leave if
anyone came to the door; and when the appellant saw that Berryhill did not
leave as promised, the appellant left the scene.

Note: The participation of counsel who had represented the appellant's
alleged co-conspirator as special prosecutor in the trial of the appellant
denied him fundamental due process of law. We cannot say, under the
record, that this error was harmless beyond a reasonable doubt.

976-177 Affd. MURDER (life) 31817
OX, JAMES PASCHAL FULTON

MMARY: On July 13, 1976, the victim, David Willis, was found dead of a
nshot wound to the chest. The State's evidence showed that appellant had
gxxxx argued with Xxxxxx Willis in the latter's apartment prior to the
illing. Appellant then left xxx and returned with a pistol, whereupon
everal shots were fired. He then returned to his own residence where,
ccording to several witnesses, he announced that he had just killed a man.
e returned once again to the scene of the shooting after police had
rrived and was arrested on the advice of certain neighbors of the deceased.
pistol taken from his pocked pursuant to the arrest was identified by a
allistics expert as the murder weapon. Although he denied any knowledge
f the shooting at the time of his arrest, appellant testified at trial that
e had shot Willis in self-defense.

1976-182 Affd. MURDER (life) CP 31834
BAKER, CLERENCE JAMES HENRY

SUMMARY: This is a companion case to Albert 30339 and Pullin 30340
See case summaries there.

1976-1[illegible] Affd. MURDER (2 counts-felony & malice) 78 31836
[illegible]ITH, BOBBY (life) (same murder involved) SCHILLY

SUMMARY: On August 19, 1975, at about 7:20 p.m., the body of Paul Theus was found off the side of a road. The body was found by a search party which had formed earlier because Theus had been missing for several hours.
Theus had been beaten, choked, and dragged resulting in death.
In the Appellant's pretrial statement he stated that while Theus was giving him a ride somewhere, Theus asked for money. Appellant owed Theus about $25.00. According to Appellant, Theus threatened him, then drove to a side road and stopped the truck. Appellant stated that Theus had a pistol and ordered Appellant out of the truck. After getting out, according to Appellant's taped statement, Appellant knocked the pistol from Theus'hand into some bushes. Appellant stated that he knew there was another gun in the truck and he ran to the truck and got it. However, Appellant discovered the rifle was not loaded so he began hitting Theus with it. The rifle broke in two while hitting Theus, according to Appellant's statement. Appellant stated that he then dragged the body into the weeds and searched for the pistol, which he found.

THE STATE DID NOT SEEK THE DEATH PENALTY.

[illegible]ILLIPS, THOMAS E. [illegible] (life) 77 31852 COFFEE
SUMMARY: See summary at 31806 - Also carded as 31852

CP

1976-185 (1971)Affd. MURDER 31848
PIERCE, WILLIAM J. Jr. (life) TREUTLEN

SUMMARY: Mrs. Thigpen was found shot to death at 9:30 AM on January 12, 1971 in J.B. Thigpen's store in Orianna Georgia. In a pretrial statement, the Appellant stated that on the morning of January 12, 1971 he let his mother out at theedoctor's office before going to look for a job. Appellant drove to the town of Adrian and continued until he got to Mrs. Thigpen's store, passing by the store without stopping on that occasion because there was a salesman there. He waited down the road until the salesman passed by While waiting he consumed several pills and a couple of drinks. After the salesman had left the store and passed where the Appellant was parked, the Appellant drove his automobile to Mrs. Thigpen's store, parked and went in. Mrs. Thigpen apparently was surprised to see Appellant return to the store, as he had apparently been in there earlier during the day. Appellant then pulled his gun on Mrs. Thigpen and demanded that she remove the bills from the cash register drawer and hand them to him. Appellant then told Mrs. Thigpen that he would like to look into the safe. Mrs. Thigpen responded by telling Appellant that there was nothing in the safe. Appellant insisted on looking into the safe, and to strengthen his demands fired a shot into the store floor, at which time Mrs. Thigpen responded to the Appellant's request to open the safe. After opening the safe Appellant saw that Mrs. Thigpen was truthful in saying the safe was empty. He began backing out towards the front door of the store with his gun aimed in Mrs. Thigpen's direction and he bumped into something. Upon looking around he noticed Mrs. Thigpen reach under the counter as if to grab something. He fired, Mrs. Thigpen went down and he went to his car and drove away and gave the weapon to a man in Waycross.

CP

1976-188 Affd. MURDER 31854
[illegible]ARD, HAROLD LEE (life) CLARKE

SUMMARY: On the afternoon of June 14, 1976, the appellant, his girl friend, and Carleton Hendrix began drinking at the trailer park in Athens, Georgia. The three of them later drove to a service station that evening to buy gas for Hendrix's car. Appellant and his girl firend left to get more money as they were unable to pay for the gas. Hendrix was left at the saation in an apparently intoxicated condition. While driving the car, appellant struck a wax tree stump by the side of the hwy dmaaging the car so badly that it could not be driven. Appellant returned to the service station and his girl fiiend walked home. After some conversation at the station, appellant and Hendrix began walking toward the Oconee Street Bridge around 9:15 p.m. Hendrixe was so intoxicated that appellant had to support him while they walked. They were last seen together standing in the middle of the bridge. At approximately 9:45 p.m., appellant approached a police officer who was parked in his car near the bridge. He told the officer that he had lost someone and asked the officer for a ride to his trailer park. When the officer refused, appellant became abusive and walked away. At about 10:00 p.m. appellant approached a fire station and engaged in a conversation with one of the firemen. Appellant told the firemen that he and Hendrix had gotten xx into an argument over the damaged car, that he had thrown Hendrix into the river, and that Hendrix couldn't swim. Appellant was intoxicated and the firemen apparently did not believe him. Three days later, on June 17, 1976, Hendrix' body was recovered from the river. ---He later said he was on the bridge with Hendrix but stated that Hendrix had fallen into the river. He denied that he had throw Hendrix off the bridge and denied he had confessed to the firemen.

1976-139 Affd MURDER 31869
WILCOX, OLIVER (life)
SUMMARY: Wilcox parked his car near the rear of an automobile in which his estranged wife and Emory Smith had arrived about 9 p.m. on April 7, 1974, at a mobile trailer where Alice Wilcox's daughter, Dorothy Reese, lived. The trailer was located in McRae in Telfair County. Approaching the Smith car, Wilcox testified he observed Smith to be armed with a pistol, so he returned to his car and armed himself. The evidence further shows his wife had left the Smith vehicle and was talking to her sister, Thelma Stewart, and a friend, Mary Alice Parker, who were sitting nearby in their car. Wilcox approached the automobile where the women were talking, greeted them and his wife, and then began walking toward the Smith car with his wife. Witnesses testified that before Wilcox and his wife reached the other car, she was seen locked with her arms around Wilcox's neck, shouting, "Quit, Oliver", followed shortly by the firing of a shot from Wilcox's gun which hit the victim in the lower left side. After that, a second shot was discharged into the victim's back behind the left shoulder. The victim fell to the ground, the witnesses stated. Then, shots were exchanged between Emory Smith and appellant with no ill-effect upon either of them. Smith fled, and Wilcox, at the insistence of his daughter, Dorothy Reese, left the scene in his automobile. Alice Wilcox was taken to the hospital by the women present where she later succumbed. - Alice Wilcox died from shots from Wilcox's gun. Before she was shot Alice Wilcox told others "she was not going to run anymore." Wilcox testified his finger was not in the trigger guard and the gun just went off twice while he was locked in the arms of his wife. He further stated Emory Smith was advancing on him with a pistol and he was trying to free himself from his wife when gun discharged.

1976-194 Affd MURDER Agg Btry Escape-Revd CP 31907
KING, TOMMY (life) (term 20yr) term-revd. DOUGHERTY
SUMMARY: On June 17, 1976 the Appellant was caught shoplifting in a Handy Mart Food Center. A police officer was called. The appellant and his two companions attacked the police officer. When they secured his weapon after knocking him out by hitting him on the head with a radio, the appellant fired it several times killing the store manager who had made a citizens arrest for shoplifting.

State sought death penalty - Jury did not return it.

1976-192 Affd. MURDER CP 31880
SPENCE, DAVID OMER (life) PAULDING
SUMMARY:

This was an extraordinary motion for new trial- no transcript-

1976-195 Affd. MURDER Burglary 31910
BROOKS, DENNIE LEE (life) (15 yrs) MUSCOGEE
SUMMARY: Ms Elizabeth Louise Shellnut, daughter of the victim Mrs Derotha Lewis was not able to contact her mother by phone on Friday evening February 21, 1975, and decided to visit her mother to see what the problem might be. At her mother's home she found found her mother lying by a chair on the floor in the bedroom where she normally sits. Her mother's body had a pillowcase over its head with a stocking tied around the face of the pillowcase; its arms was tied behind its back with stockings. A light was on near the left front bedroom which was unusual and a gun was missing from her mother's home.

Appellant's statement was as follows. He, McClendon and a man known as "Dirty Red" entered the victim's home for the purpose of stealing. Dirty Red stepped up behind the woman and held her while Appellant brought some stockings and a pillowcase to tie the woman. Then Appellant and McClendon searched throughout the house for something to steal. After leaving the house, McClendon gave Appellant a dollar in change which he had taken from a drawer in the victim's home. McClendon- Appellant's co-defendant also admitted that Mrs. Lewis' home was burglarized while she was tied up. Medical examination of the body of the victim revealed that the cause of death was cardiac failure due to hemorrhage and infraction of the right atrium or the right auricle region of the SA node pacemaker. She also had other Bruises. The medical examiner concluded that the beating of the victim was the direct cause of the heart failure.

TRANSCRIPT NOT INCLUDED - ONLY ISSUE WAS VOL. OF PRETRIAL STATEMENT BY 16 yr old

1976-196 Affd. MURDER (life) Child Cruelty (5 yrs) CP Domestic 102 31929 DEKALB

AITES, CHARLIE Glenn

SUMMARY: This is a child abuse case wherein the child was bruised, had ...ain concussion and finally became unconscious on February 8, 1976 when ...e was taken to the hospital. He also had burns on his genitals and in ...he rectal area. He remained in a coma until he died on February 16, 1976 ...of a subdural hematoma. The victim was John Robert Dobbs, age 2 1/2 the ...stepson of the appellant..

...ote: Trial Judge took case away from the jury after the finding of guilty ...nd sentenced the defendant himself.

1976-... (1971) affd MURDER (affd) 103 31943 DOUGLAS

...S, BILLY WAYNE

SUMMARY: Date of offense was Dec. 8, 1971. Charles Reed and Bobby Caddis ...estified that they had been playing poker in the basement ofa house on ...avis' used car lot in Austell with Birt, Davis and Otis Ridling when a ...conversation arose about a prior game involving Davis and the victim in ...his case, Charles Make Sibley. At that game, Sibley had won about ...fourteen thousend dollars from Davis, who had been forced to give Sibley ...and "I owe you." Apparently Birt suggested to Davis that they rob ...Sibley and pay him back with his own money. Davis countered x that he ...ad a better idea. Gaddis testified that a meaningful look was then ...exchanged between Birt and Bxxxy Davis, a while Birt stated that Davis ...suggested that they not only rob, but also murder, Sibley.

Birt testified that Davis, Birt, and Ridling carried out their plan ...the next night. Birt and Davis entered Sibley's house using a key and ...aited for their victim to come home. Meanwhile Ridling cruised by at ...fifteen minute intervals. When Sibley came home, the two robbed him of ...several thousand dollars, when Birt put him into a closet and shot him. ...His body was discovered the next day. Davis paid Birt with cash and a ...car.

...ote: this is a 1971 Pre-Furman offense.

1976-197 (1971)AFFD. MURDER Agg Asslt-3 cts (life ----------) Domestic 31931 FULTON

...OOPER, WILLIAM MURRAY

SUMMARY: The appellant on leave from Milledgeville State Hospital ...hot and killed a niece and shot his sister and another niece. ...n Jan 29, 1971. He apparently became angry over something and had ...been drinking wine and became embroiled in a family fuss and when ...is sister tried to drive him away from the home in her car he became ...ngry and started shooting.

...ote: A pre Furman offense - state did not seek death penalty.

1976-204 Affd. MURDER (life) 31970 FULTON

DEAN, BOBBY JOE

SUMMARY: The State's evidence showed that Dean went to the apartment of his ex-wife at approximately midnight, carrying a rifle; that he falsely identified himself as a neighbor, in order to get xx his ex-wife xx to ~~approxxxxxxxxxxxxxxx~~ open the door to her apartment on July 25, 1976; that when the door was opened Dean shot the night cahin off the door, and entered proclaiming something to the effect of "I got y'all"; that a struggle ensued between Dean and the victim, the fiancee of his ex-wife; and that the victim (Ralph J. Phillips) was killed by a shot in the back, fired far enough away so that no "powder burns" were present around the wound. This was the account given hm of the incident by Dean's ex-wife.

NOTE: The State waived the death penalty.

1976-205 Affd MURDER 3198
[illegible], ARTHUR (life) FULTON

SUMMARY: Two witnesses for the state testified that they saw the defendant, male, 5'2", 195 pounds, slap the victim Catherine Chaney, a female 5'2", 104 pounds, and knock her to the floor. One of the witnesses then saw the defendant kick the victim several times about the head and abdomen. A medical examiner testified that the victim died two weeks later as a result of pneumonia caused by these injuries. The offense occurred on Apr.24,1976. Appellant testified he had helped the victim move a week before and she still owed him $10 of the $30 she had promised. When he went to collect that she was drinking and carrying on and when she turned to run in the house he thought she was going to get a gun so he slapped her.

Death penalty not sought.- Judge just directed enter a life sentence.

CP

1976-206 Affd. MURDER 3198
BIRT, CLARENCE (life) JEFFE

SUMMARY: The deceased Willie Jordan came up to where the Appellant and a mutual girl fix friend were sitting in a pickup truck. Some argument ens and they went "down the road" to settle it. Appax Apparently Appellant shot twice at the Appellant victim while he was in his automobile going down the road near Wrens, Ga. and when Appellant's vehicle stopped from mechanical malfunction he ran into the woods and the Appellant shot him there. Offense xxxxxx occurred on Jan. 11, 1976.

Judge simply sentenced defendant to life- No agg circumstances evident.

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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78-6899

CORRECTED PARAGRAPH 2 APPEARING

ON PAGE 11 OF RESPONDENT'S BRIEF

On appeal to the Supreme Court of Georgia, the Petitioner challenged the constitutionality of the death penalty, and raised numerous other issues. The Supreme Court of Georgia held: (1) The evidence was sufficient. (2) Certain photographs of the murder scene were properly admitted. (3) The motion to challenge the composition of the grand jury had been made untimely. (4) The trial court was correct in not charging on a lesser degree of homicide, namely manslaughter. (5) The motions for mistrial were properly denied by the trial court. (6) The motion for a continuance was properly denied inasmuch as counsel was appointed on September 21, 1977, but did not present the motion until February 1, 1978. (7) That both murder charges were properly tried at the same time. (8) That the motion for change of venue on the basis of pretrial publicity had not shown that the jurors summoned had formed any fixed opinions as to Petitioner's guilt or innocence from any pretrial publicity. (9) The death penalty was not unconstitutional. The Supreme Court of Georgia thus affirmed the Petitioner's convictions and sentence to death for murder. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). This Court granted certiorari, limited to the issue of whether the Supreme Court of Georgia in affirming the death sentence in this matter had adopted such a broad and vague construction of the aggravating circumstance under which the death penalty was imposed in this case so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. ___U.S.___, 62 L.Ed.2d 133 (1979).

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BRIEF FOR RESPONDENT

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979), *cert. granted*, __ U.S. __, 62 L.Ed.2d 133 (1979).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 27, 1979. The motion for rehearing by the Petitioner was denied on March 27, 1979. The petitioner for writ of certiorari was filed on June 25, 1979. Petitioner's application for stay of execution and enforcement of sentence of death was granted by Mr. Justice Powell on August 14, 1979. The petition was granted on October 9, 1979. Jurisdiction obtains under 27 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Ga. Code Ann. § 27-2534.1(b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

This case involves the Eighth Amendment:

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

This case also involves the Fourteenth Amendment:

> . . . [N]or shall any state deprive any person of life, liberty, or property without due process of law. . .

Statutory Provision:

This case involves the seventh aggravating circumstance of Georgia's 1973 death penalty enactment which provides:

> (7)The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.[1]

STATEMENT OF THE CASE

On the evening of September 20, 1977, in Polk County, Georgia,[2] Petitioner armed with a .20 gauge Savage rifle-shotgun combination shot to death his wife, Mildred Godfrey,[3] and his mother-

[1] The complete statute is set forth as Appendix A to this brief [hereinafter cited as "App. A at _____."]

[2] Polk County is approximately sixty miles northwest of Atlanta, Georgia.

[3] Mildred Godfrey had been the wife of Robert Franklin Godfrey for approximately twenty-eight years. (T. 363).

in-law, Chessie C. Wilkerson along with striking his eleven-year-old daughter, Tracy Godfrey, in the forehead with the barrel of his shotgun, causing a laceration to the scalp of approximately one inch. (R. 5; T. 136, 209, 210, 211).

Charged with murder[4] and aggravated assault,[5] Godfrey was tried March 6-9, 1978, in the Superior Court of Polk County.

Godfrey was found guilty of each charge on March 9, 1978. (A. 72, 73).

The sentencing phase of the trial began following lunch on the afternoon of March 9, 1978, before the same jury that returned the guilty verdicts.[6]

Evidence was introduced to show that on September 5, 1977, the Petitioner and his wife had been arguing,[7] and during that argument Mildred Godfrey told Petitioner that she was going to leave him. (T. 109, 168). The Petitioner in his own testimony characterized the tenor of this argument as being heated, compounded by the fact that he had been drinking. (T. 366).[8] During this argument on September 5, 1977, the Petitioner in order to stop his wife from leaving their home pulled out a pocketknife and told her to sit down on the couch or he would cut her. (T. 110, 168). In fact, during an earlier part of the argument Petitioner had locked himself and his wife in the bathroom to their home. (T. 166). After the argument Petitioner's wife left and stayed with other relatives until she went to live with her mother-

[4] Ga. Code Ann. § 26-1101 (1972 Rev.)

[5] Ga. Code Ann. § 26-1302 (1977 Rev.)

[6] Ga. Code Ann. § 26-3102 (1977 Rev.). The Court is familiar with this procedure used in capital cases in Georgia. *See, Gregg v. Georgia,* 428 U.S. 153, 163-166 (1976).

[7] This argument on Labor Day was over a utility bill. (T. 166, 194).

[8] The Petitioner testified that he and his wife had been previously separated and had encountered marital difficulties because of a drinking problem that he had, which led on one occasion to his wife taking out a warrant for his arrest. (T. 364). On two of the occasions that Petitioner was separated from his wife because of his drinking problems he was hospitalized. (T. 364, 365).

in-law. On the day following this argument while the Petitioner was at work, his older daughter Cathy Venable, went back to her parents home in order to get some of her mother's clothing, and while there she went into the bathroom and gathered up some clothing which included two garments that Petitioner had cut off his wife while they were arguing in the locked bathroom the day before. (T. 168).

Some time after the confrontation between Petitioner and his wife on the 5th of September, Mildred Godfrey went to Mr. Charles E. Hunt, a Justice of the Peace[9] and secured a warrant charging her husband with aggravated assault. (T. 160, 162).[10]

Two days after the altercation on September 5, 1977, Mildred Godfrey filed for divorce from the Petitioner. (T. 599). On page three of the divorce complaint in paragraph 12, Mildred Godfrey alleged that she feared for her life from the Petitioner and was afraid that he would inflict bodily harm on her unless the court restrained him. (T. 599). The hearing on the divorce complaint was set for September 22, 1977. (T. 599). Robert Godfrey was served with a copy of the complaint for divorce on September 9, 1977. (T. 599).

After Mildred Godfrey separated from her husband, she went to live with her mother, Mrs. Chessie Wilkerson, in her mother's trailer which is located several yards down the road from the Godfrey home. (T. 110-112, 172, 206). Nothing much transpired between the Petitioner and his wife from the time the divorce complaint was filed until September 20, 1979. Mildred Godfrey's daughter, Cathy Venable, did relate that following her parents separation, Petitioner told her that he would accept a divorce. (T. 172). Petitioner Godfrey, who was employed as a male nurse

[9] *See generally*, Ga. Code Ann. § 24-4, *et seq.*

[10] The record concerning whether this warrant was ever served upon Petitioner is silent, since it appears that after the warrant was issued it was given to Mrs. Godfrey, as the Justice of the Peace received no further information as to whether or not the warrant was ever executed. (T. 163).

at the Northwest Regional Hospital, Rome, Georgia, told one of his co-workers, Elizabeth Newton, on the morning of the shooting that he and his wife were getting a divorce. (T. 151, 152). Petitioner Godfrey remarked to Elizabeth Newton that by the 21st the divorce would be over with, and that he was selling his house as part of the divorce settlement. (T. 152). Elizabeth Newton also testified that based upon her observations of Petitioner Godfrey on September 20, 1977, she did not detect anything abnormal in his behavior or actions. (T. 153, 154).

On the evening of September 20, 1977, Tracy Godfrey, the Petitioner's eleven-year-old daughter was playing a game with her mother and grandmother in her grandmother's trailer. (T. 205). While playing this game Tracy heard a gunshot, and not realizing what it was at first, this young girl thought that somebody was shooting a dog. (T. 210). Almost immediately young Tracy Godfrey realized that her mother had been shot as she saw her mother's head drop,[11] and heard screams from her grandmother. (T. 210, 211). Tracy at first believed that the gunshot came from the front of the trailer, but when instructed by her grandmother to go get help she went out the back of the trailer only to be hit in the head with the end of the barrel of her daddy's shotgun. (T. 211). After being struck in the head, Tracy Godfrey managed to run to her sister's home which is several yards from the grandmother's trailer. (T. 211). Tracy Godfrey further testified that as she was running to her sister's house she heard another gunshot followed by screams from her grandmother which was then followed by another shot. (T. 212).

Upon hearing the gunshots the Petitioner's older daughter, Cathy Venable, noticed her younger sister Tracy running from the back of the trailer, and once Tracy came into her home she closed the doors, locked them and called the police. (T. 177, 178). It was not until the police arrived that Cathy Venable noticed that her father was sitting in a lawn chair in her front yard. (T. 178).

[11] Tracy Godfrey in describing the direction that the first shot was fired from also noted that she saw a shell on the table and gun powder. (T. 213).

Evidence was also introduced from Carl Rice, the county jailer, that on the evening of September 20, 1977, he received a phone call from Godfrey, in which Godfrey told him that he had blown his wife and mother-in-law's heads off and to send the sheriff for him. (T. 198).

When the Polk County Police arrived at the scene of the homicides they observed Petitioner Godfrey sitting in a chair under a tree approximately fifty yards from Chessie Wilkerson's trailer. (T. 215). Godfrey called over to Police Officer Seals Minchew who was approaching him as he was seated in a chair and told him that there was no use in going into the trailer in that they were dead, and that he had killed them. (T. 215, 216). Petitioner Godfrey then proceeded to take Officer Minchew to an apple tree approximately fifty yards away from where he was sitting, and in the fork of the tree he had placed the shotgun. (T. 216). The weapon was then inspected by Officer Minchew, and found to be empty. (T. 217).

When Petitioner Godfrey was placed in a patrol car he was told by Polk County Sheriff Seals Swafford that he would be in the custody of the county police. (T. 275). Godfrey responded by telling Sheriff Swafford that everything had been taken care of, that it was over with, and that they were in there. (T. 275). Later on at the county police offices Petitioner Godfrey stated to County Patrolman James McLendon, "Mack, I've done a hideous crime, but I have been thinking about it for eight years, I'd do it again." (T. 239, 240). At the time Petitioner Godfrey made this statement he appeared to be calm and collected. (T. 239). In fact, at the time Petitioner Godfrey was first confronted by law enforcement officers following the shootings he did not appear to be upset, agitated or intoxicated. (T. 227, 228, 232, 234, 235, 241, 243).[12]

[12] Petitioner Godfrey's daughter, Cathy Venable had testified that when her daddy was drinking he was mean, but that several days before the shooting she observed three cans of beer in the refrigerator, and that each time she looked in the refrigerator, to and including a day or so following the shooting the same three cans of beer were in the refrigerator. (T. 182, 187, 188).

The murder scene inside the trailer can only be described as one of vile horror. Mildred Godfrey's body was discovered on the floor of her mother's trailer, with a hole the size of a silver dollar in her forehead and the back portion of her head broken up apparently from the shotgun blast which passed through her head leaving pellets imbedded in the kitchen cabinets. (T. 218, 219, 259). There was a hole in the screen of a window facing the kitchen area off the carport to the trailer. (T. 261). Mildred Godfrey's mother, Mrs. Chessie Wilkerson, was likewise found lying on the floor of her trailer, face down, with the top part of her head missing. (T. 258, 265). In the living room area of the trailer officers found what appeared to be the top part of her skull while portions of her brain protruded approximately a foot and one-half from her head.[13] (T. 265). There was a great deal of blood on the ceiling, and a good deal of it was dripping from the ceiling to the floor. (T. 273). The fatal wounds were inflicted from a shotgun as is evidenced by the fact that an expended shell was found under the kitchen table, another shell in the trailer carport and three live shells were found outside the trailer along a fence. (T. 218, 247, 253, 256, 268, 277, 278).

In defense of these charges Petitioner Godfrey claimed that at the time of the shootings he was insane. To support this defense Petitioner Godfrey presented the testimony of Doctor William S. Davis, a psychiatrist who had formerly treated Petitioner for alcohol abuse and depression. (T. 306, 307). In his testimony on behalf of Petitioner, Doctor Davis related that he had examined the Petitioner in February of 1978 pursuant to a court

[13] The medical examinations that were performed on the two bodies revealed that Mildred Godfrey had a wound some three and one-half to four inches wide in her forehead, and that Mrs. Wilkerson had lost a considerable amount of bone and soft tissue, skin and hair above the right ear. (T. 289, 290). The medical examinations established that both women died from gunshot wounds to the head with resulting brain damage. (T. 290, 292).

order. (T. 307). Doctor Davis' testimony indicated that Petitioner was so upset because his wife refused any attempts at reconciliation that he suffered a dissociative attack, which resulted in forgetting all events concerning the shootings.[14] (T. 312, 313). Doctor Davis further testified that Petitioner Godfrey might have known right from wrong while in such a state, but that he would be unable to control his actions to prevent his doing wrong. (T. 324). Doctor Davis attempted to support this finding by relating that he had injected Petitioner Godfrey with a drug called Amytal, but that the results of the injection were not as good as he would have liked for them to have been. He still proceeded to go ahead with the interview. (T. 328, 329).

To rebut Godfrey's contention that he was insane at the time of the shootings, the state called Doctor Robert Wildman, a clinical psychologist at Central State Hospital, Milledgeville, Georgia and Doctor Carl Smith, a psychiatrist at Central State Hospital.[15] Both of these witnesses for the State testified that Petitioner Godfrey manifested no symptoms of abnormal behavior, had no history of psychosis or insanity, nor did he have any organic brain damage or exhibit any abnormal behavior. (T. 432, 476, 478, 480). This testimony is indicative of the fact that Godfrey's behavior and thinking are not those which are normally associated in cases of psychosis. (T. 480). Both Doctor Wildman and Doctor Smith concluded that Godfrey's actions and performance were on a conscious level without any sort of mental illness and that he was able to distinguish between right and wrong and could hear and follow that which was morally right had he decided to do it at the time of the killings. (T. 485, 486). Furthermore, Doctor Wildman gave testimony which indicated that Godfrey during his testing was either uncooperative, or was trying to appear more disturbed than he actually was. (T. 435).

[14] It should be noted that Doctor Davis in his testimony stated that the validity of a diagnosis of a dissociative state is based upon the truthfulness of the statements which the individual under examination provides to him. (T. 335).

[15] Central State Hospital is the main state facility in middle Georgia where individuals are examined to determine their competency to stand trial, as well as their ability to distinguish right from wrong at the time of the offense.

The State had also presented testimony from other individuals who had observed Petitioner Godfrey either before the shootings or immediately thereafter, and these individuals expressed opinions that Robert Godfrey was sane and able to distinguish between right and wrong. (T. 141, 153, 200, 228, 229).

In his testimony to the jury Robert Godfrey stated that on three occasions his wife had him committed for drinking problems. (T. 364).[16] Godfrey fully admitted that on September 5, 1977, he and his wife had been arguing, but he denied making any threats to his wife with a knife, claiming instead that he could not recall his ever doing this on the 5th of September. (T. 366). Petitioner Robert Godfrey further testified that on each of the three occasions following his being hospitalized for drinking his wife had agreed to take him back, but on this last occasion following their argument of September 5, 1977, she refused to consider it. (T. 367, 368).

Concerning the day of the shootings, Petitioner Robert Godfrey testified that he called his mother-in-law to ask her to have his wife call him back. (T. 371). When Mildred Godfrey called Petitioner back she informed him that she wanted all the proceeds from the sale of their house, a matter which Petitioner found unsuitable. (T. 373). Mrs. Godfrey told Petitioner that she would call him back, and when she did they continued to argue, during which time she reminded the Petitioner that the divorce proceedings would be coming up in court on the 22nd, and that things would be settled at that time. (T. 374, 375, 376). The last thing that Petitioner Godfrey said he recalled remembering was hanging up the telephone after talking with his wife, followed by his waking up in the county jail on September 21, 1977. (T. 376).

[16] These occasions were in 1950, 1966 and 1971. (T. 364).

The verdict was guilty of murder on both counts, and guilty on the charge of aggravated assault. (A. 72; T. 566).

In the punishment phase of the trial, argument was made to the jury without the tendering of any further evidence. (T. 568-577). In its instruction concerning punishment, the Court told the jury that it was their duty to fix the punishment concerning the two murder counts. (T. 577). The jurors were instructed that the authorized punishments for murder were "death or by imprisonment for life." (T. 577).

The court told the jury to determine whether there was a statutory aggravating circumstance present beyond a reasonable doubt; the court told the jury that the aggravating circumstance which they could consider was "that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;" and, that if the jury did not find an aggravating circumstance beyond a reasonable doubt they would fix the punishment at life imprisonment, and even though they found to be present a statutory aggravating circumstance they could nevertheless recommend a life sentence. (T. 578). The court also explained:

> Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame. Aggravating circumstances are those which increase the guilty or enormity of the offense, or add to its injurious consequences.
>
> * * *
>
> In determining a verdict in this case you shall consider any mitigating circumstances which you find, and you may consider any of the following aggravating circumstances which may be supported by the evidence. (T. 578).

The jury found the presence of the statutory aggravating circumstance submitted and imposed the death penalty on each count. (A. 80, 81; T. 580).

On appeal to the Supreme Court of Georgia, the Petitioner challenged the constitutionality of the death penalty, and raised numerous other issues. The Supreme Court of Georgia held: (1) The evidence was sufficient. (2) Certain photographs of the murder scene were properly admitted. (3) The motion to challenge the composition of the grand jury had been made untimely. (4) The trial court was correct in not charging on a lesser degree of venue on the basis of pretrial publicity had not shown that were properly denied by the trial court. (6) The motion for a continuance was properly denied inasmuch as counsel was appointed on September 21, 1977, but did not present the motion until February 1, 1978. (7) That both murder charges were properly tried at the same time. (8) That the motion for change of venue on the basis or pretrial publicity had not shown that the jurors summoned had formed any fixed opinions as to Petitioner's guilt or innocence from any pretrial publicity. (9) The death penalty was not unconstitutional. The Supreme Court of Georgia thus affirmed Petitioner's convictions and sentence to death for murder. *Godfrey v. State,* 243 Ga. 302, 253 S.E.2d 710 (1979). This Court granted certiorari, limited to the issue of whether the Supreme Court of Georgia in affirming the death sentences in this matter had adopted such a broad and vague construction of the aggravating circumstance under which the death penalty was imposed in this case so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. __ U.S. __, 62 L.Ed.2d 133 (1979).

SUMMMARY OF ARGUMENT

I.

In reponse to *Furman v. Georgia,* 408 U.S. 238 (1972), the General Assembly of Georgia enacted a new death penalty statute. An essential aspect of this legislative enactment is the automatic appellate review by the Supreme Court of Georgia which examines the imposition of the death penalty in three specific areas. The review by the Supreme Court of Georgia further controls the individual sentencing characteristics of the 1973 Death Penalty Act. The Petitioner's sentence to death conforms to the requirement that the death penalty be imposed in especially serious crimes, second that the sentence is not rarely imposed for such a crime, and finally, that the sentence does not contain any arbitrariness or discrimination. Petitioner's sentence falls within the ambient class of those who callously and cold-bloodedly plan the execution of their adversaries, and on whom such sentences to death are consistently imposed. The review by the Supreme Court of Georgia in the Petitioner's case is in conformity with the mandate of the 1973 death penalty enactment.

II.

In examining the Petitioner's sentence to death under the seventh aggravating circumstance of Georgia's death penalty statute, the Supreme Court of Georgia has not adopted such a vague or overly broad interpretation of that particular aggravating circumstance, since it has consistently held that the essential statutory language is that which was found by the jury in the Petitioner's case. The remaining language in the seventh aggravating statutory circumstance is merely illustrative language, which a finding standing alone would render it subject to vagueness. However, the jurors' finding of the statutory wording that each murder was "outrageously or wantonly vile, horrible or inhuman," is language which has been defined by the Supreme Court of Georgia, and is language which is readily capable of

understanding by the average juror. The jurors' finding in this matter is not a partial finding, neither is the interpretation given to the jurors' finding in this case overly broad or vague so as to violate either the Eighth or Fourteenth Amendments.

III.

The punishment of death for the double execution style murders of the Petitioner's wife and mother-in-law is not disproportionate in relation to the crimes for which it is imposed, and neither is it disproportionate in that the death penalty has been consistently imposed upon those individuals who callously plan the execution of their adversaries.

I.

THE SUPREME COURT OF GEORGIA HAS CONSISTENTLY SINCE 1973 ENGAGED IN A MEANINGFUL APPELLATE REVIEW OF THOSE CASES INVOLVING THE DEATH PENALTY.

In 1973 the General Assembly of Georgia in response to this Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972), enacted a death penalty statute which controlled the conditions under which the death penalty could be sought and applied. Ga. Laws 1973, p. 159. An essential component of this legislation was the appellate review procedure to be undertaken by the Supreme Court of Georgia.[17] The review to be undertaken by the Supreme Court of Georgia is basically a three-pronged examination to insure that the evidence supports the existence of the statutory aggravating circumstance under which the death penalty was imposed; to insure that the sentence was not imposed under any arbitrary influence such as passion or prejudice; and third, that the sentence is proportionate to the crime in that for similar types of conduct the death penalty has been imposed. As

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[17] Appendix A to this brief sets out the detailed review to be undertaken by the Supreme Court of Georgia.

of the date of the writing of this brief the Supreme Court of Georgia has reviewed some ninety-nine cases in which the death penalty has been imposed. Of these ninety-nine cases, sixty-six have been affirmed, five have been reversed for errors in the guilt phase, and twenty-two have been reversed on the sentencing phase.[18]

Additionally, this Court has reversed six cases concerning errors in the sentencing phase.[19]

In capital cases the Eighth Amendment requires a consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). The 1973 death penalty statute in Georgia is responsive to such Eighth and Fourteenth Amendment requirements. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976). To insure that the sentencing decision is fully informed, taking into consideration the characteristics of the defendant and the crime, the fail-safe device against aberrant death sentences is afforded by the appellate review process in the Georgia death penalty legislation, a mechanism which amounts to a reevaluation of the sentencing decision. Ga. Code Ann. § 27-2537. This review procedure by the Supreme Court of Georgia specifically requires the court in conducting its review to have as a part of its opinion a separate discussion of the sentence, and that the court shall hire a staff to assemble data regarding the appropriateness of the sentence, as well as including in its finding reference to decisions in which the

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[18] Appendix B to this brief contains a listing of all of the death penalty cases in Georgia to date, and the basis and circumstance under which the death penalty has either been affirmed or reversed.

[19] *Coker v. Georgia,* 433 U.S. 584 (1977); *Eberheart v. Georgia,* 433 U.S. 917 (1977); *Hooks v. Georgia,* 433 U.S. 917 (1977); *Davis v. Georgia,* 429 U.S. 122 (1976); *Presnell v. Georgia,* 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); *Green v. Georgia,* ___ U.S. ___, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

death penalty had been imposed in similar cases. Ga. Code Ann. § 27-2537(e)(g).

Thus, the appellate review procedure in the 1973 death penalty legislation eliminates as far as humanly possible the risk of arbitrary, freakish or discriminary decisions in a capital case. In fact, this Court in *Gregg,* specifically held that the Georgia statute does limit unchecked discretion at both the sentencing and appellate stages. *Id.* at p. 206. This Court's confidence in the Supreme Court of Georgia in carrying out its mandated at appellate review was commented upon in *Gregg, supra* at p. 207 (plurality opinion), and has not gone unheeded, nor has the Supreme Court of Georgia taken its appellate review responsibility for granted by sitting back and taking a rubber stamp approach in its reviews. *See Proffitt v. Florida,* 428 U.S. 242, 255 (1976).

Petitioner argues that the Supreme Court of Georgia has not adhered to its sentencing responsibilities as initially found by this Court in *Gregg. Id.* at pp. 204-206 [plurality opinion] (Petitioner's Brief at pp. 50-51). Petitioner argues that the Supreme Court of Georgia has adopted a vague and broad construction of its appellate review functions, which is exemplified by its apparent refusal to require that in the sentencing phase of the proceedings that the trial court enumerates specific examples of mitigating circumstances in a particular case. (Petitioner's Brief at p. 51). In upholding the death penalty in Georgia, this Court in the plurality opinion in *Gregg* specifically noted that juries in this State are permitted to consider any mitigating circumstance. *Id.* at p. 206. Furthermore, in *Lockett v. Ohio,* 438 U.S. 586 (1978), this Court specifically noted, "(that the Georgia Legislature had decided to permit the jury to dispense mercy on the basis of factors too intangible to write into a statute. *Gregg,* 428 U.S. at 222 . . .)" *Lockett v. Ohio,* 438 U.S. at 606, f.n. 14.

The Supreme Court of Georgia's interpretation of the Georgia General Assembly's intention not to limit what could be considered as mitigating evidence is further set forth in *Spivey v.*

State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978). In *Proffitt* this Court approved the Florida statute which specifically lists mitigating circumstances under the belief that this list was not exclusive. *Id.* at p. 250, f.n. 8. *See also, Lockett v. Ohio*, 438 U.S. at 606. The Texas statute does not even contain a reference to mitigating factors *Jurek v. Texas*, 428 U.S. 262 (1976). Petitioner's argument that the seventh aggravating circumstance is subject to such a broad and vague construction because jurors are not given specific examples of mitigating circumstances is directly contrary to the position taken by this Court in *Lockett v. Ohio, supra*, in which this Court struck down the Ohio death penalty procedure because it limited the mitigating factors which could be considered by the jury. *Lockett* requires individualized consideration of mitigating circumstances, but does not require that the jurors' discretion be channelled or limited to what mitigating circumstances can be submitted. *Id.* at 608.

Having jurors specifically informed as to what are the mitigating circumstances, would tend to limit consideration of other mitigating circumstances, for it would focus directly on those which were enumerated during the court's instructions, and could tend to overshadow other matters which jurors might consider as mitigating. Petitioner's argument that the seventh aggravating circumstance is subject to vagueness or overbreadth on appellate review because of the absence of a listing of the specific mitigating circumstances is inconsistent with this Court's holdings in *Gregg, Proffitt* and *Lockett*. The enumeration of specific mitigating circumstances has nothing to do with whether the seventh aggravating circumstance of the Georgia Death Penalty Act has been applied too broadly in this instance or whether too vague a construction has been given to that language. As will be discussed later on in this brief, the Petitioner's contention on page 51 of his brief deals more with the question of proportionality than it does with vagueness and overbreadth.

Petitioner argues that the narrowing or channelling of jury discretion is required in the area of mitigating evidence. Again

this is a view which does not square with *Lockett*, since it is the State of Georgia's understanding that in the area of mitigation wide latitude should be given to an accused, and that the channelling to narrow the jury's discretion is to be in terms of the aggravating circumstance, not relevant mitigating factors. *Green v. Georgia*, __ U.S. __, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Lockett v. Ohio, supra*, at 606.[20]

The Supreme Court of Georgia has not hesitated to vacate a death sentence under its appellate review function where it finds the sentencing procedures were defective.[21] The Supreme Court of Georgia in its reviews has looked to insure that the jury's discretion is channelled so that sentencing which results in the death penalty results to the most abhorrent crimes. Two decisions by the Supreme Court of Georgia which reflect the Court's concern that jurors are fully instructed before they impose the death sentence as to their duty to consider mitigating evidence, and that there be some definition of mitigating evidence is found in *Hawes v. State*, 240 Ga. 327, 238 S.E.2d 418 (1977), and in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 828 (1977), in which the Supreme Court of Georgia specifically said that jurors must be instructed that even though they find the existence of a statutory aggravating circumstance they still could impose a life sentence.[22]

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[20] *See also, Gates v. State*, _____ Ga. _____ (Decided Oct. 24, 1979, No. 35053); *Cobb v. State*, 244 Ga. 344, 359 (1979); *Spivey v. State, supra; Thomas v. State*, 240 Ga. 393, 401, 402, 242 S.E.2d 1 (1977); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975).

[21] *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), 428 U.S. 153 (1976) [no death penalty for armed robbery.] *See also*, cases contained in Appendix B to this Brief.

[22] *See also, Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978); *Davis v. State*, 240 Ga. 763, 243 S.E.2d 12 (1978); *Redd v. State*, 240 Ga. 753, 242 S.E.2d 628 (1978); *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *Burger v. State*, 242 Ga. 28, 247 S.E.2d 834 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978).

The Supreme Court of Georgia has also reversed the imposition of the death penalty where the prosecutor has made an improper comment during his argument to the jury in the sentencing phase of the trial. *Prevatte v. State,* 233 Ga. 929, 214 S.E.2d 365 (1975); *Jordan v. State,* 233 Ga. 929, 214 S.E.2d 365 (1975). Where the defendant was refused permission to testify in mitigation in the punishment phase of the trial as to why he shot the victim, the Supreme Court of Georgia reversed the trial court's decision for improperly limiting the type of mitigation evidence which could be presented. *Brown v. State,* 235 Ga. 644, 220 S.E.2d 922 (1975). In *Sprouse v. State,* 242 Ga. 831 (1979), the death sentence was set aside because of the failure of the jurors to specify which aggravating circumstance they found beyond a reasonable doubt in imposing the death sentence. In the case of *Holton v. State,* 243 Ga. 312, 253 S.E.2d 736 (1979), the sentence to death was set aside because in considering the seventh aggravating circumstance the jury imposed the sentence of death upon a finding of "depravity of mind." The Supreme Court of Georgia in its opinion held that this was a partial finding of the seventh statutory aggravating circumstance subject to vagueness. *Id.* This decision is consistent with the Court's earlier holding in *Harris v. State,* 237 Ga. 718, 730 (1976), that the words "depravity of mind," "torture" and "aggravated battery" were illustrative words and that the essential statutory language is "outrageously or wantonly vile, horrible or inhuman." Ga. Code Ann. § 27-2534.1 (b) (7). Further evidence of the seriousness with which the Supreme Court of Georgia has undertaken its appellate review is found in the cases of *Owens v. State,* 233 Ga. 829, 214 S.E.2d 173 (1975) and *Griggs v. State,* 241 Ga. 317, 320, 245 S.E.2d 269 (1979), concerning the question of whether a proposed venireman was excused in violation of *Witherspoon v. Illinois,* 391 U.S. 510 (1968). In the case of *Stack v. State,* 234 Ga. 19, 214 S.E.2d 514 (1975), the death penalty was set aside because of an error in admitting testimony of a polygraph operator, as well as the Supreme Court of Georgia's noting that the trial judge's report

contained an indication that the evidence did not foreclose all doubt. *Id.*

Additional evidence of the dedication and serious application by the Supreme Court of Georgia to its review function is found in the case of *Hall v. State,* 241 Ga. 252, 244 S.E.2d 833 (1978), where the sentence to death was set aside because of the co-defendant who was the triggerman received a life sentence. Likewise, in the case of *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976), the Supreme Court of Georgia found that the statutory aggravating circumstance which permits the implementation of the death penalty where a homicide is perpetrated by an individual who has a "substantial history of serious assaultive criminal convictions," to be unconstitutional. *See,* Ga. Code Ann. § 27-2534.1(b)(1).

Petitioner also attacks the adequacy of the appellate review process by the Supreme Court of Georgia, stating that the cases listed in the appendix to his case in the opinion by the Supreme Court of Georgia, when considering the factual circumstances, the background, the accused's mental state and the mitigating circumstances bear "no real similarity to the fifteen cases listed." (Petitioner's Brief at p. 45). In *Moore v. State,* 233 Ga. 861, 864, 213 S.E.2d 829 (1974), *cert. den.,* 428 U.S. 910, *rehng. den.,* 492 U.S. 873 (1976), the Supreme Court of Georgia specifically commented upon its review responsibilities under Ga. Code Ann. § 27-2537 (c)(3), concerning "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In *Moore,* the Supreme Court of Georgia held as follows:

> Appellant cites two trials, not a part of the record of this trial, which he alleges are similar to the facts in the instant case wherein the death sentence was not imposed. Although they were not considered by the trial judge and cannot be considered by this court, some comment is appropriate concerning this Court's duty to compare the sentence in this

> case with that imposed in similar cases. As we view the court's duty in light of *Furman* and *Jackson* cases and the statutory provisions designed by the Georgia Legislature to meet the objections of those cases, ***this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics.*** On the contrary, we view it to be our duty under the similarity standard to insure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed,' as stated by Justice Stewart in his concurring opinion in the *Furman* and *Jackson* cases (408 U.S. 238, 310), *supra.* (Emphasis added).

See, Gregg v. Georgia, supra, 204, f. n. 56. Thus, the measuring rod is whether "juries generally throughout the state have imposed the death penalty." *Jarrell v. State,* 234 Ga. 410, 216 S.E.2d 258 (1975), *cert. den.,* 428 U.S. 910, *rehng. den.,* 429 U.S. 873 (1976).

In making the assertion that the Supreme Court of Georgia in its appellate review has failed to consider similar cases, the State of Georgia is thus led to believe that the Petitioner would deny that the double shotgun murders of his wife and mother-in-law cannot be characterized as execution style killings, or that they were premeditated in nature. To the contrary, the State of Georgia believes that these homicides were execution murders, and that they were premeditated, callous and cold-blooded killings. The cases contained in the appendix of similar cases relied upon by the Supreme Court of Georgia in upholding Petitioner's sentence to death are similar, in that of those cases thirteen involved cold-blooded or premeditated execution style killings.[23]

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[23] *Gregg v. State,* 233 Ga. 117, 210 S.E.2d 659 (1974), 428 U.S. 153 (1976); *Floyd v. State,* 233 Ga. 280, 210 S.E.2d 810 (1974), *cert. den.,* 431 U.S. 949, *rehng. den.,* 434 U.S. 882 (1977); *Chenault v. State,* 234 Ga. 216, 215 S.E.2d 233 (1975), *cert. den.,* 434 U.S. 878, *rehng. den.,* 434 U.S. 976 (1977); *Smith v. State,* 236 Ga. 12, 222 S.E.2d 308 (1976),

Ten of those cases involved anticipation of death by the murder victims much like this case where one victim was shot first; the mother-in-law dying shortly after the horrible realization that she too would be put to death.[24] One of the cases in the *Godfrey* Appendix involved the slaying of a former spouse and his new wife which is indicative of the death penalty being invoked for a so called "domestic slaying."[25] Each of the cases cited in the Appendix to the *Godfrey* decision are illustrative of murders being outrageously or wantonly vile, horrible or inhuman.[26]

To support his contentions that the appellate review procedure is inadequate in this instance, Petitioner has attached as an appendix to his brief a police report concerning a double homicide caused by an estranged husband to his wife and her lover. As noted in *Ross v. State,* 233 Ga. 361, 366 (1974), the Supreme Court of Georgia stated, "That nothing in the statute forecloses this court during the course of its independent review of examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *See also, Gregg,* at p. 204, f.n. 56. The

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cert. den., 429 U.S. 952, *rehng. den.,* 429 U.S. 1055 (1977); *Birt v. State,* 236 Ga. 815, 225 S.E.2d 248 (1976), *cert. den.,* 429 U.S. 1029 (1976); *Gaddis v. State,* 239 Ga. 238, 236 S.E.2d 594 (1977), *cert. den.,* 434 U.S. 1088, *rehng. den.,* 435 U.S. 981 (1978); *Coleman v. State,* 237 Ga. 84 (1976), *cert. den.,* 431 U.S. 909, *rehng. den.,* 431 U.S. 961 (1977); *Issacs v. State,* 237 Ga. 105, 226 S.E.2d 922 (1976), *cert. den.,* 429 U.S. 986 (1976); *Dungee v. State,* 237 Ga. 218, 227 S.E.2d 746 (1976), *cert. den.,* 429 U.S. 986 (1976); *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. den.,* 430 U.S. 975 (1977); *Young v. State,* 239 Ga. 53, 236 S.E.2d 1 (1977), *cert. den.,* 434 U.S. 1002, *rehng. den.,* 434 U.S. 1051 (1978); *Westbrook v. State,* 242 Ga. 151, 249 S.E.2d 524 (1978), *cert. den.,* _____ U.S. _____, 99 S.Ct. 881, 59 L.Ed. 63 (1979); *Finney v. State,* 242 Ga. 582, 250 S.E.2d 388 (1978), *cert. den.,* _____ U.S. _____, 99 S.Ct. 2017, 60 L.Ed. 388 (1977).

[24] *House v. State,* 233 Ga. 140, 205 S.E.2d 217 (1974), *cert. den.,* 428 U.S. 910, *rehng. den.,* 429 U.S. 873 (1976); *Floyd, supra; Birt, supra; Coleman, supra; Issacs, supra; Dungee, supra; Banks, supra; Peek v. State,* 239 Ga. 422, 238 S.E.2d 12 (1977), *cert. den.,* _____ U.S. _____, 99 S.Ct. 218 (1978); *Westbrook, supra; Finney, supra.*

[25] *Smith v. State, supra.*

[26] *Banks, supra.*

important aspect is to keep in mind the fact that in *Ross, supra,* the Supreme Court of Georgia stated: "The comparative sentence review 'is designed to aid this court's determination of how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed. It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated, whether before or after *Furman v. Georgia.* When a reaction is substantially out of line with reactions of prior sentencers, then this Court must set aside the death penalty as excessive.' " *Id.* at pp. 366-367.

The case cited in Appendix B to the Petitioner's Brief while concerning a double homicide, is a case in which the defendant had been drinking, and had just come from court following a divorce having been granted. Moreover, this case involved a negotiated plea. *See e.g., Brady v. United States,* 397 U.S. 742 (1969). In addition, this case does not involve premeditated murder.

The appellate review procedures in the death penalty statute passed in 1973 by the Georgia General Assembly insures a careful appellate review of each death sentence to insure its constitutionality. First, the sentence must be in an authorized category; secondly, it cannot be arbitrary; and lastly, it cannot be disproportionate to the punishment imposed in similar cases upon similar defendants. Petitioner has failed to show that the seventh aggravating circumstance under which his death penalty was imposed is incapable of a meaningful appellate review, or that in his case the Supreme Court of Georgia has not adhered to its duties legislated to it by the General Assembly of Georgia.

II.

THE SUPREME COURT OF GEORGIA HAS NOT ADOPTED AN OPEN-ENDED APPLICATION OF THE AGGRAVATING CIRCUMSTANCE UNDER WHICH PETITIONER WAS SENTENCED TO DEATH.

The State of Georgia sought the death penalty against the Petitioner for the execution style double shotgun slayings of his wife and mother-in-law under the seventh aggravating circumstance contained in Georgia's 1973 death penalty statute, which reads:

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann. § 27-2534.1(b)(7)

Initially it should be noted that Petitioner attacks in his brief the facial constitutionality of the seventh aggravating circumstance, (Petitioner's Brief at p. 41). However, this Court in *Gregg* rejected the attack that the seventh statutory aggravating circumstance was so vague or overly broad that it could be applied to just about any homicide.[27] In *Gregg* this Court held that in reviewing the seventh aggravating circumstance it found that the "vagueness" and "overbreadth" argument did not render this circumstance to be invalid under the Eighth and Fourteenth Amendments since it was capable of having capital punishment instituted other than by arbitrariness or capriciousness. *Gregg* at pp. 200-201, f.n. 51. The question upon which certiorari was granted in this case is whether in *this case* the Supreme Court of Georgia has taken such a broad and vague approach to the construction of the seventh aggravating circumstance so that it amounts to a violation of the Eighth and Fourteenth Amendments. (Emphasis added). The State of Georgia submits that in this case, and in the other cases decided under Ga. Code Ann. § 27-2534.1(b)(7), the Supreme Court of Georgia has not

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[27] *Gregg, supra,* 428 U.S. at 201 (plurality opinion).

adopted an overly broad or vague construction to this seventh statutory aggravating circumstance. Since the enactment of the 1973 death penalty statute in Georgia there have been forty-three cases including that of the Petitioner upon which the sentence of death has been imposed under the seventh aggravating circumstance either alone or in combination with another statutory aggravating circumstance. (*See*, Appendix B to Respondent's Brief). At the time that this Court decided *Gregg*, 428 U.S. 153, there was only one death penalty case which had been affirmed by the Supreme Court of Georgia solely predicated upon the seventh aggravating circumstance. *See, McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974).[28]

Since this Court's decision in *Gregg* there have been ten death penalty cases in which the only aggravating circumstance found was that which is contained in Ga. Code Ann. § 27-2534.1(b)(7).[29] Over the past six years the Supreme Court of Georgia has specifically commented upon its review under the seventh statutory aggravating circumstance in terms of arguments that this circumstance is more likely to be subjected to an open-ended interpretation, or would be permitted to be a "catch-all" situation when no other aggravating circumstance exists. *Gates v. State*, *supra*, f.n. 20; *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Hill v. State*, 237 Ga. 794, 229 S.E.2d 737 (1976); *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 479, *cert. den.*, __ U.S. __ (December 10, 1979).

Before examining what the Supreme Court of Georgia has said in regard to its interpretation and application of the seventh aggravating circumstance, the question of breadth and vagueness in its implementation in this case should be addressed. Petitioner has asserted that the jury's finding that the murder was outrageously or wantonly vile, horrible or inhuman is a partial, in-

[28] *Gregg*, 428 U.S. at 201.
[29] *See*, Appendix B to Respondent's Brief.

complete and uncertain finding of the seventh aggravating circumstance which renders it so broad so as to violate the Eighth and Fourteenth Amendments. (Brief of Petitioner at p. 20).

The spirit of the review procedure embodied in Ga. Code Ann. § 27-25 is accomplished by the Supreme Court of Georgia when it examines the evidence in a particular case to determine not only whether the evidence supports the aggravating circumstance returned by the jury, but also whether in similar situations jurors have returned the death penalty. Similar circumstances would include such things as *mens rea*, the nature of the wounds, the nature of the weapon used, and whether there was any planning, or predisposition to murder by the defendant. Similar circumstances are not to be limited in this instance to so called pure "domestic homicides," because in this case while the victim and perpetrator were family, the murders here were not the result of a sudden and irresistible impulse generated in the heat of passion[30] generated by a state of high emotional tensions building up to a crescendo immediately preceding the killings which typify the course of events in most domestic homicides. The facts in this case necessarily warranted the Supreme Court of Georgia in its review to look at and consider during its appellate review those cases which evidenced a predisposition on the part of a defendant to not only inflict grievous bodily injury, but an intent to murder. *Sub judice*, the facts clearly reveal that Petitioner planned these homicides, and had intended to reach the results he achieved on September 20, 1977, for some time. Under the facts contained herein and the list of similar cases considered by the Supreme Court of Georgia cited in the appendix to its decision it cannot be concluded that the affirmation of Petitioner's sentence was the result of an "ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 109 (1972).

The affirmation of Petitioner's sentences were not result orien-

[30] *See*, Ga. Code Ann. § 26-1102 (Rev. 1977), which concerns murders which arise out of the heat of passion.

tated, nor the result of whim and subjective decision-making by the Supreme Court of Georgia. In other like situations, Georgia juries have returned the death penalty as evidenced by the cases not only in the appendix to the decision by the Supreme Court of Georgia in Petitioner's case, but in other cases as well. *See,* Appendix B to this Brief.

In considering the issue of vagueness the Court here is not concerned with the impermissive delegation of policy decisions to juries. *See e.g., Grayned v. City of Rockford,* 408 U.S. 104 (1972). Rather, the vagueness aspect of the limited grant of certiorari in this case is whether the Supreme Court of Georgia has permitted the death penalty to be affirmed in what facially appears to be a standard domestic killing. To the contrary, Petitioner's conduct falls within a well defined class of individuals on whom the death penalty has been imposed for murders which were the result of premeditation. (Appendix C to this Brief). Once you chip away and remove the facade that the murders were the result of nothing more than a domestic disagreement, the heinous nature of Petitioner's crimes becomes apparent. Exposing these murders in their proper light reveals that the affirmation of the death penalty has not been arbitrary. Neither has the upholding of the death penalty to Petitioner been applied to conduct for which fair warning has not been previously given that such actions result in the supreme penalty being meted out. *See, Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). The Supreme Court of Georgia has consistently interpreted the words "outrageously or wantonly vile, horrible or inhuman" to apply only to cases such as those embodied in this situation to the hard core, or callous and cold-blooded murders. *Harris v. State,* 237 Ga. at 733. *See also,* Appendix C to this Brief, and discussion *infra.*

Petitioner's challenge on the alleged broad interpretation of Ga. Code Ann. § 27-2534.1(b)(7) by the Supreme Court of Georgia must likewise fail, because the cases previously affirmed by the court under the seventh aggravating circumstance clearly

establish that not everyone who murders will receive the death penalty, as this aggravating circumstance is reserved and applied to those limited numbers of murders which are either pre-planned[31] senseless execution style murders, [32] involve excessive torture to the victim,[33] or are evidenced by severe mutilation or disfigurement to the victim.[34] The murders of Mildred Godfrey and her mother, Chessie Wilkerson were planned; they were killed in an execution style manner; and, the weapon used was one capable of causing severe mutilation, and in fact did result in the atrocious disfigurement of both women.

> [T]he severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment." *Trop v. Dulles,* 356 U.S. 86, 111 (1957), [Justice Brennan concurring.]

The nature of the crime is a prominent consideration in determining whether the sentence imposed has violated the Eighth Amendment. *Coker v. Georgia,* 433 U.S. 584, 598-602 (1977); *Weems v. United States,* 217 U.S. 349, 365-366 (1909). The true nature of Petitioner's crimes places him in the category of people who have generally received the death penalty, and the affirmance of these penalties by the Supreme Court of Georgia has not resulted in too broad an application of the seventh statutory aggravating circumstance of Georgia's 1973 death penalty legislation.

The seventh aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7), is quite similar or identical to an aggravating circumstance in the Florida death penalty which reads "especially heinous, atrocious, or cruel." Fla. Stat. Ann. § 921.141(5)(b)(c) (Supp. 1976-77). This Court in *Proffitt v.*

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[31] *Smith v. State,* 236 Ga. 12 (1976).
[32] *Banks v. State,* 235 Ga. 121, 218 S.E.2d 851 (1975).
[33] *Birt v. State,* 236 Ga. 815 (1976).
[34] *McCorquodale v. State,* 233 Ga. 369 (1974).

Florida, 428 U.S. 242, 255 (1976), specifically rejected an attack upon the language contained in the Florida statute as being so vague and broad so as to render any defendant in a capital case subject to being a nominee for the death penalty. *Id.* In fact, this Court stated that this wording contained adequate guidance for those who had the responsibility of recommending or imposing a death sentence. *Proffitt v. Florida,* 428 U.S. at 256. Admittedly, at the time this Court considered the Florida death penalty in *Proffitt* the Florida Supreme Court had given some directory language as to its interpretation of Florida's eighth statutory aggravating circumstance which is similar to Georgia's seventh statutory aggravating circumstance. *Proffitt v. Florida,* 428 U.S. at 255. Furthermore, at the time decisions were rendered in *Proffitt* and in *Gregg,* there was only one case in Georgia which involved a sole finding of the seventh statutory aggravating circumstance as noted above, and this Court had no difficulty in agreeing with the State of Georgia that it involved a horrifying torture murder. *Gregg v. Georgia,* 428 U.S. at 201.

The essential or key language in Georgia's seventh aggravating circumstance is "outrageously or wantonly vile, horrible or inhuman." The wording of this seventh aggravating circumstance under Georgia's death penalty enactment is identical in meaning and import to the wording in the Florida death penalty statute of "especially heinous, atrocious, or cruel." Fla. Stat. §§ 921.141 (5) (b) (c), (Supp. 1976-77).

This Court in its plurality opinion in *Gregg,* held that "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.* at 201 *See also, Proffitt v. Florida,* 428 U.S. at 255. The Supreme Court of Georgia has not permitted the seventh aggravating circumstance to be applied in an open-ended manner, nor has it permitted it to become a "catch-all." In the case of *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), this Court

need only look at the concurring opinion by Justice Hall. *Banks* was decided on July 13, 1976, or some ten days after this Court decided *Gregg* and *Proffitt.* In the concurring opinion by Justice Hall in *Banks,* there is evidence that the seventh aggravating circumstance would be given limited construction similar to that which the Florida Supreme Court had adopted in construing its eighth aggravating circumstance which is closely kin to Georgia's seventh aggravating circumstance. Justice Hall in construing the seventh aggravating circumstance in light of *Proffitt* stated, "The same construction can be given in the Georgia statute, and applying that test to the facts in this case (see majority opinion), these two murders were especially outrageous, wantonly vile, horrible, inhuman and manifested exceptional depravity in the manner in which they were executed. In my opinion, this Court has not given Code Ann. § 27-2534.1(b)(7) an open-ended construction. . . . In the words of the Florida Supreme Court, 'the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." (Citation omitted).

In both *Gregg* and *Proffitt* this Court in construing Georgia's seventh aggravating circumstance and Florida's eighth aggravating circumstance stated that the language contained in these sections was capable of being understood by juries.[35]

In October of 1976, the Supreme Court of Georgia gave a further indication as to its interpretation of the words contained in the seventh aggravating circumstance when it decided the case of *Harris v. State,* 237 Ga. 718, 230 S.E.2d 1 (1976).[36] *Harris* involved a wanton killing for thrill in which the jury returned a death penalty only under one statutory aggravating circumstance, that being the seventh aggravating circumstance. In *Harris,* the Supreme Court of Georgia held:

> This aggravating circumstance [the seventh] involves both the effect on the victim, viz., torture, or an aggravated bat-

[35] *Gregg* at p. 202; *Proffit* at pp. 255-256, f.n. 51.

[36] Later reversed for inadequate sentencing instructions. *Harris v. Hopper,* 243 Ga. 244, 253 S.E.2d 707 (1979).

tery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.

* * *

Each of these terms used is clearly defined in ordinary dictionaries, Black's Law Dictionary, or Words and Phrases and is subject to understanding and application by a jury. *Harris* at 732.

* * *

We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as *illustrating* the crimes were outrageously or wantonly vile, horrible or inhuman. Each of these cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core. *Id.* at 733. (Emphasis added).

In interpreting the seventh aggravating circumstance the Supreme Court of Georgia as seen in its opinion in *Harris, supra,* has held that the words, "depravity of mind," "torture," or "aggravated battery to the victim," are exemplary words, or put another way are words which are examples of conduct which is outrageous or wantonly vile, horrible or inhuman in which jurors in the past have consistently imposed the supreme punishment upon a defendant in a capital case. The Supreme Court of Georgia has not in its construction of this seventh aggravating circumstance read it in the disjunctive as is argued by the Petitioner. (Brief of Petitioner at p. 23). In the case of *Holton v. State,* 243 Ga. 312, 253 S.E.2d 736 (1979), the Supreme Court of Georgia refutes petitioner's argument that the seventh aggravating circumstance can be applied disjunctively, that is, that this seventh aggravating circumstance can be broken up so that all terms or parts in there are co-equal. In *Holton,* the jury imposed the death penalty under the seventh aggravating circumstance by merely finding that the murder constituted "depravity of mind." *Id.* at p. 318.

> The jury fixed the punishment on both counts of murder as death 'by reason of depravity of mind.' This is only a part of a statutory aggravating circumstance. It omits all reference to the words 'outrageously or wantonly vile, horrible or inhuman.' *Id.* at p. 318.

In *Holton, supra,* the Supreme Court of Georgia specifically rejected applying the seventh aggravating circumstance in the disjunctive, holding that the words "depravity of mind" standing alone would be vague. *Id.* at p. 13. More importantly, is the fact that the Supreme Court of Georgia is again saying that the essential words of the seventh aggravating circumstance are the words "outrageously or wantonly vile, horrible or inhuman," which again gives credence to the conclusion that similar to the words in Florida's eighth statutory aggravating circumstance these words as found by the jury in the Petitioner's case are the required words which need to be found, and the other words such as depravity of mind, aggravated battery or torture are merely illustrative words which exemplify the manner in which the murder was outrageously or wantonly vile, horrible or inhuman.

In the case of *Ruffin v. State,* 243 Ga. 95, 252 S.E.2d 472 (1979), *cert. den.,* December 10, 1979, a case which involved the shotgun killing of an eleven-year-old boy, the jury returned a sentence of death upon finding the existence beyond a reasonable doubt of two statutory aggravating circumstances, one of which was the seventh aggravating circumstance. The jury in writing out its finding held, "By evidence presented to us, we the jurors conclude that this act was both horrible and inhuman. We conclude that Bonnie B. Bulloch, an eleven-year-old defenseless child, was taken by force and arms and was ruthlessly executed on July 26, 1976." The Supreme Court of Georgia found that the jurors' verdict as worded above was sufficient when compiled with its review of the evidence in the case, and the statutory aggravating circumstances which were submitted to the jury for its consideration. *Id.*

The words, "torture, depravity of mind, or an aggravated battery to the victim," are predicate words, or words which affirm or further express what is said of the subject as being adverbial modifiers, words which modify outrageously or wantonly vile, horrible or inhuman. The words, outrageously or wantonly vile, horrible or inhuman are words of common or ordinary everyday usage which need not be defined *per se*. The Supreme Court of Georgia has limited the application of the seventh aggravating circumstance to actual situations which are at the "core and not the periphery" of the seventh aggravating circumstance. *Harris v. State*, 237 Ga. at 733. Thus, the Supreme Court of Georgia has provided a definition as to the outrageous or wantonly vile, horrible or inhuman by setting forth cases which it says are the core and not the periphery of this seventh aggravating circumstance so that future cases will be restricted to those situations which are core cases for outrageously or wantonly vile, horrible or inhuman.

In examining the list of cases to the appendix in *Godfrey* which the Supreme Court of Georgia considered as similar cases, those cases clearly get to the core of the seventh aggravating circumstance. Those cases either involve a premeditated execution style murder, which is present in this case, or contain cases in which there is an anticipation of death to either all or one of the victims as well as severe disfigurement to the victims. *Sub judice*, Chessie Wilkerson anticipated certain death at the hands of the Petitioner when she saw her daughter shotgunned before her eyes, and made a desperate effort to send for help through her eleven-year-old granddaughter, a matter which was to no avail. *See, Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974). Each of the cases involving anticipation of death, premeditated or execution style homicides, were considered in its review by the Supreme Court of Georgia. Moreover, the Supreme Court of Georgia considered the case of *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976), which involved a double execution style homicide by use of a shotgun. This case is similar to the *Godfrey* case in terms of execution style murder, use of a shotgun, and the anticipation of

death to one of the murder victims. The cases of *Young v. State*, 239 Ga. 53, 236 S.E.2d 1 (1977); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978), are similar in terms of the aggravated injury or battery which the murder victims sustained. In this case both murder victims sustained severe damage to the head area. Specifically, Chessie Wilkerson had the top portion of her skull removed causing blood to be sprayed upon the ceiling and adjacent cabinets.[37] All of the cases cited by the Supreme Court of Georgia in its appendix are similar cases in which the injuries inflicted to the victims are of an aggravated nature, all of which arise to a finding of outrageously and wantonly vile, horrible or inhuman.

Therefore, it cannot be said that a premeditated execution style homicide is not per se outrageous, or that the nature of the killings in this instance is not vile because of the preplanning and actual snuffing out of human life. Neither can it be said that a murder which inflicts serious bodily damage to wit: blowing away a portion of the skull of each victim is not outrageous or wantonly vile or inhuman. In comparing the cases contained in Respondent's Appendix B, to the facts and circumstances in this case, as well as to the cases set forth in the appendix of the review by the Supreme Court of Georgia, it cannot be said that the Supreme Court of Georgia has given the seventh aggravating circumstance such a vague or all encompassing application so as to be violative of the Eighth and Fourteenth Amendments.

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[37] Another case evidencing severe damage to the head following an execution style murder with a shotgun is contained in *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978).

III.

THE SUPREME COURT OF GEORGIA HAS NOT GIVEN AN OVERLY BROAD CONSTRUCTION TO THE SEVENTH AGGRAVATING CIRCUMSTANCE IN THE PETITIONER'S CASE, FOR THE PETITIONER'S SENTENCES TO DEATH ARE PROPORTIONATE TO OTHER OFFENDERS WHO HAVE BEEN FOUND GUILTY OF PREMEDITATED MURDER.

The underlying principle in *Furman* which reoccurs in *Gregg, Proffitt,* and *Jurek,* is the concern that the death penalty not be imposed in any one case for any arbitrary, capricious, or penologically improper reason, and that the penalty be imposed from case to case on a similar nonarbitrary, rational and consistent basis. Consistency and proportionality are thus identical in order to prevent and protect against the "freakish" imposition of the death penalty.[38] Consequently, the underlying theme in *Furman, Gregg, Proffitt* and *Jurek* seems to be that there must be some meaningful basis to separate those cases in which the death penalty is applied compared with the majority of cases in which it is not. *Furman,* 408 U.S. at 313 (Opinion of Justice Stewart). In order to advance these aims the Georgia procedure provides clear standards to guide the sentencing body, *Gregg* at 194-95; the findings must be in writing, *Id.;* the instructions during the sentencing phase must be specific enough concerning aggravating and mitigating circumstances, *Gregg* at 166, f.n. 9; and there must be a review mechanism to insure that the death penalty is proportionally applied. *Gregg* at 205.

There can be no question that in capital cases the Eighth Amendment mandates that the sentencing authority give consideration to not only the character and record of the defendant, but to the circumstances of the particular crime, all of which are required in order for due process to be achieved before the death penalty can be inflicted. *Bell v. Ohio,* 438 U.S. 637 (1978);

[38] *Furman,* 408 U.S. at 310.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Consequently, in order for the state to take a life there is a requirement that there must be some "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. at 287. The question in the grant of certiorari concerning whether the Supreme Court of Georgia has given too broad an interpretation of the seventh aggravating circumstance, Ga. Code Ann. § 27-2534.1(b)(7), addresses itself to the proportionality of the Petitioner's sentence in relation to the crimes for which he was convicted.

It is the position of the State of Georgia that the proportionality of the Petitioner's sentences to death must be reviewed not in terms of the killings as "domestic murders," or who the victims were, but as to the motivation and premeditated aspects of the crime. The fact that these crimes involve domestic relationships is merely incidental, and should not be viewed as the controlling factor in determining proportionality of the death sentences in this case,[39] for to do so would mean a judicial intervention of a legislative function which this Court has said would be recognized in death penalty statutes. *Gregg v. Georgia,* 421 U.S. at 181-182.

> The severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment. *Trop v. Dulles,* 356 U.S. 86, 111 (1957), Justice Brennan concurring.

Juries in Georgia have consistently across the board imposed the death penalty for premeditated murders, murders involving witness elimination, and those where there has not only been premeditation, witness elimination, but where there has been anticipation of death to one of the victims. See, Appendix C to Respondent's Brief.

It was also observed in *Gregg* that '[t]he jury . . . is a sig-

[39] See *United States v. Antelope,* 430 U.S. 641 (1977).

> nificant and reliable index of contemporary values because it is so directly involved. 428 U.S., at 181, 96 S.Ct. at 2929, and that it is thus important to look at the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the juries' judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. *Coker v. Georgia,* 433 U.S. 584, 596 (1977).

Petitioner argues that the Supreme Court of Georgia has given an overly broad interpretation to the seventh aggravating circumstance by arguing that the death penalty has not traditionally been imposed in "domestic murder cases." (Brief of Petitioner at p. 43). Petitioner by placing a label on these killings as "domestic murder cases," is in actuality disgusing the true nature of these homicides, which traditionally have resulted in a consistent application by juries in this State in imposing the death penalty. The killings of the Petitioner's wife and mother-in-law are not the result of any sudden flair up, third party love triangle, or of sudden anger brought on and inflamed by alcohol. To the contrary, the uncontradicted evidence in this case establishes that the Petitioner at the time of these killings was sober; that he had been planning these murders for some time; that he showed no remorse in the killings and to some extent was satisfied;[40] that the wounds which were inflicted and the manner in which they were inflicted were intended to be fatal in that both victims were shot in the head at a fairly close range with a shotgun; that between the killings of the wife and the mother-in-law, the mother-in-law being the second victim, that victim must have suffered a great deal of mental anguish in anticipation of certain death since the Petitioner had to reload his shotgun. This evidence clearly shows a callous preplanned execution style murder of two individuals. The fact that they were the Petitioner's wife and mother-in-law should

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[40] *Compare Harris v. State,* 237 Ga. 718 (1976).

not materially effect whether the death sentence is proportionate, for proportionality should be viewed in terms of whether in other similar preplanned execution style murders the death penalty has been invoked. The State of Georgia contends that the record speaks for itself in this regard as evidenced by the list of cases contained in Respondent's Appendix B.

The case of *Dix v. State,* 238 Ga. 209, 232 S.E.2d 147 (1976), specifically held a domestic murder did not mean that the death penalty could not be inflicted even though it frequently was not imposed or sought. *Dix v. State,* 238 Ga. at 216. The *Dix* case is a clear example of a cold-blooded callous murder involving violent and outrageous treatment to the victim. Furthermore, there was no evidence in *Dix* that at the time of the killing he was intoxicated or that the killing arose from an impassioned argument. In fact, there is evidence in *Dix* that the murder was planned by the statement which was made to the victim's mother-in-law, "Don't open that door . . . Your not messing my plans up." *Dix v. State,* at 210.

In another Georgia death penalty case which is domestic in nature, *Smith v. State,* 236 Ga. 12, 222 S.E.2d 308 (1976), the former wife of the victim and her new husband procured the services of another individual to return to Georgia to allure Mrs. Smith's former husband and his new wife into a secluded area so that they could kill them for the purposes of obtaining the proceeds of an insurance policy under which she was the beneficiary of her ex-husband. The area of similarity between *Smith* and the present case is that of premeditation. Similarly, in *Alderman v. State,* 241 Ga. 496, 246 S.E.2d 642 (1978), a case in which the jury returned a death penalty under two statutory aggravating circumstances, one of them being the seventh aggravating circumstance, Alderman was sentenced to death in connection with his premeditated murder plot to kill his wife for insurance proceeds. Once again, the thread of similarity is the premeditated aspect of this murder regardless of the fact it arose out of a domestic relationship.

Petitioner as a special addendum to his brief has attached 104 pages of notes prepared by the Court Administrator under Ga. Code Ann. § 27-2537(e)(f). [Petitioner's Brief at pp. 48, 49]. The thrust of this material is to suggest that the death penalty in a domestic killing is disproportionate. This contention, however, fails to take into consideration plea bargaining,[41] prosecutorial discretion, and the fact that the evidence may not have shown that the murder was premeditated; that the evidence may have shown that the defendant and the victim had been drinking; and, that the killing was spontaneous in terms of occurring in the heat of passion.

Of the forty-five cases cited in this special Addendum,[42] four cases involved child deaths or child abuse.[43] Four cases involved defendants who were intoxicated.[44] In fourteen cases there was no premeditation, that is the killings arose in the heat of the argument.[45] In one instance the jury could not decide as to the sentence, and therefore the trial court imposed a life sentence.[46] In another case the death penalty was not in effect.[47]

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[41] *Brady v. United States,* 397 U.S. 742 (1970).

[42] References to this special Addendum will be cited as S.A., followed by the respective page number in the addendum.

[43] *Proveaux v. State,* 233 Ga. 456, 211 S.E.2d 747 (1974), S.A. 19; *Rampley v. State,* 235 Ga. 101 (1975), S.A. 46; *Staymate v. State,* 237 Ga. 661, 218 S.E.2d 747 (1976), S.A. 85; *Waites v. State,* 238 Ga. 683, 235 S.E.2d 4 (1977), S.A. 102. *See also, Stamper v. State,* 235 Ga. 165, 219 S.E.2d 140 (1975).

[44] *Johnston v. State,* 232 Ga. 268, 206 S.E.2d 468 (1974), S.A. 4; *Brown v. State,* 235 Ga. 806, 18 S.E.2d (1975), S.A.; *Abner v. State,* 233 Ga. 922, 213 S.E.2d 851 (1975), S.A. 22; *Nichols v. State,* 233 Ga. 466, 211 S.E.2d 755 (1974), S.A. 23; *Woods v. State,* 242 Ga. 277 (1978), S.A. 30.

[45] *Johnston v. State, supra,* f.n. 43; *Roosevelt v State,* S.A. 5; *Smith v. State,* 232 Ga. 371, 207 S.E.2d 13 (1974), S.A. 8; *Bonds v. State,* 232 Ga. 694, 208 S.E.2d 561 (1974), S.A. 14; *Abner v. State, supra,* f.n. 43; *Freeman v. State,* 233 Ga. 745, 213 S.E.2d 643 (1975), S.A. 26; *Woods v. State, supra,* f.n. 43; *Shy v. State,* 234 Ga. 816, 218 S.E.2d 599 (1975), S.A. 35; *Adams v. State,* 236 Ga. 468, 224 S.E.2d 32 (1976), S.A. 59; *Flury v. State,* 237 Ga. 273, 227 S.E.2d 325 (1976), S.A. 64; *Little v. State,* 237 Ga. 391, 228 S.E.2d 801 (1976), S.A. 72; *Richardson v. State,*

In another death penalty case involving a domestic killing where the death penalty was imposed, *Blake v. State,* 239 Ga. 292, 236 S.E.2d 637 (1977), *cert. den.,* 434 U.S. 960 (1977), the seventh aggravating circumstance was the only one found. In *Blake,* the defendant and his wife were separated, and defendant in order to get back at his wife threw their two-year-old child off a 100 foot bridge. This too was a premeditated murder, with domestic overtones of revenge against the wife rather than revenge to the wife.

In examining the question of proportionality the nature of the wounds inflicted and the type of weapon used are extremely relevant. In this instance the Petitioner inflicted serious bodily injury to his victims through a shotgun, a weapon which has a wide shot pattern as contrasted with a bullet which is a single missile with a straight trajectory versus the fanning out pattern of a shotgun. In addition to Petitioner's case, there have been six other cases in which the death penalty has resulted where the weapon used was a shotgun.[48] In affirming the death penalty, there have been at least thirty cases which have involved premeditated execution style slayings. (See Appendix C to Respondent's Brief.)

To conclude as Petitioner does that the Supreme Court of Georgia has too broadly construed the seventh aggravating circumstance in upholding his sentences to death for domestic mur-

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237 Ga. 778, 229 S.E.2d 617 (1976), S.A. 88; *Mitchell v. State,* 238 Ga. 420, 233 S.E.2d 173 (1977), S.A. 90; *Cooper v. State,* 238 Ga. 502, 233 S.E.2d 762 (1977).

[46] *Brown v. State,* S.A. 57; *See also, Miller v. State,* 237 Ga. 557, 229 S.E.2d 376 (1976).

[47] *Nichols v. State, supra,* f.n. 43.

[48] *Dobbs v. State,* 236 Ga. 427, 224 S.E.2d 3 (1976); *cert. den.,* 430 U.S. 975, *rehng. den.,* 431 U.S. 960 (1977); *Banks v. State,* 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. den.,* 430 U.S. 975 (1977); *Pryor v. State,* 238 Ga. 698, 234 S.E.2d 918 (1977), *cert. den.,* 434 U.S. 935, *rehng. den.,* 434 U.S. 1003 (1977); *Lamb v. State,* 241 Ga. 10, 243 S.E.2d 59 (1978); *Morgan v. State,* 241 Ga. 485, 246 S.E.2d 198 (1978), *cert. den.,* ____ U.S. ___ (1979); *Ruffin v. State,* 243 Ga. 95, 252 S.E.2d 472 (1979), *cert. den.,* ____ U.S. ____ (December 10, 1979).

ders is to ignore the heinous nature of the crimes for which he has been sentenced to death, crimes which have more often than not resulted in the imposition of the death penalty. The nature of the crime is a prominent consideration in determining whether the sentence violates the Eighth Amendment, but not the relationship of offender to victim as Petitioner argues. *Coker v. Georgia,* 433 U.S. at 58-601, 602; *Weems v. United States,* 217 U.S. at 365-366. In comparison to the challenged punishment in this case with the punishments which have been handed out by other juries in this State, it cannot be said that the Petitioner's sentences are disproportionate, or that the Supreme Court of Georgia has too broadly applied the seventh aggravating circumstance to this case. The Petitioner's sentence to death involves that egregious element calling for the ultimate penalty, which is the fact that the crimes here were preplanned and carried out in a careful and callous manner. Evidence that the Petitioner intentionally intended to inflict grievous bodily harm on his wife and mother-in-law, and that he knew what he was doing in addition to the statement which he gave to the police officers reflecting that, is evidenced in his conduct towards his eleven-year-old daughter whose life he spared. This is significant as it is indicative of the fact that Petitioner knew what he was doing, since he did not seek to harm his child, but sought directly to execute his wife and mother-in-law. While this eleven-year-old child did receive a laceration to her forehead, the evidence suggests that the blow was more of a passing nature to get his daughter out of his way so that she would not interfere with his ultimate plan.

The evidence in this case also authorizes a finding of premeditated murder by Petitioner, since he waited until it was dark before he went to his wife's trailer so that he would not be seen with his shotgun. (T. 175). In the dark the Petitioner could stealthily move about undetected so that his plans could not be disturbed.

The Petitioner's crimes are not crimes of passion, nor are they a crime which occurred because of a domestic argument in a "Saturday night" fight in which either party was intoxicated. The

killings were well thought out, as expressed in the Petitioner's statement that he had been planning it for some time. The choice of the weapon which the Petitioner used also reflects planning. The lack of remorse is significant in showing the Petitioner's mental state at the time of the killings and immediately thereafter. As noted by this Court in the plurality opinion in *Gregg,* 428 U.S. at 201, "It is, of course, arguable that any murder involves depravity of mind or an agravated battery. But this language need not be construed this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." The State of Georgia submits that the Supreme Court of Georgia has not adopted a broad application to the seventh aggravating circumstance.

The killings in this case while they involve severe dismemberment of the head area to each victim are merely indicative of the intent and utter hatred which accompanied the vendetta which the Petitioner had planned against his unsuspecting wife and mother-in-law. Never to execute a wrongdoer under facts as those which appear in this case, regardless of how vile the actions are is to proclaim that no act is so irredeemably vicious as to deserve death.

> The cold-blooded and callous nature of the offense in this case are the types condemned by death in other cases. *Jarrell v. State,* 234 Ga. 410, 426, 216 S.E.2d 258 (1975), *cert. den.,* 428 U.S. 910, *rehearing den.,* 429 U.S. 873 (1976).

The Petitioner in attempting to reject the death penalty has the burden of showing that his crime does not deserve capital punishment because it is not a case in which a similar penalty has not been consistently applied more often that not by the jurors in the State of Georgia. Respondent submits that this burden has not been carried out, and that to the contrary the facts in this case when compared with the other cases mentioned in this brief unequivocally establish that the Petitioner's sentences to death are proportionate, and that the Supreme Court of Georgia has not adopted such a broad overview in its application of Ga. Code Ann. § 27-2534.1(b)(7) to the facts in this case.

CONCLUSION

Petitioner has not demonstrated that the death penalty provided for under Ga. Code Ann. § 27-2534.1(b)(1) has been given such a broad and vague construction so as to violate his Eighth and Fourteenth Amendment rights. Petitioner has not met his burden of showing that his punishment is disproportionate in similar cases, or that the Supreme Court of Georgia has adopted such an open-ended view of the seventh aggravating circumstance permitting it to become a receptacle for death penalty cases which do not fall within any other statutory aggravating circumstance.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John W. Dunsmore, Jr., Attorney of Record for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served the foregoing Brief for Respondent on the Petitioner by depositing copies of the same in the United States mail, with first class postage, prepaid, addressed to Counsel of Record at the following post office addresses:

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This ____ day of December, 1979.

_____
JOHN W. DUNSMORE, JR.

APPENDIX

APPENDIX A

1. Statutory Procedures

Ga. Code Ann. § 26-3102 (Supp. 1977).

"26-3102. *Capital offenses; jury verdict and sentence.*—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty." (Ga. Laws 1973, p. 159, 170).

Ga. Code Ann. § 27-2302.

"27-2302. *Recommendation to mercy.*—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." [Ga. Laws 1974, pp. 352, 353].

Ga. Code Ann. § 27-2503.

"27-2503. *Presentence hearings in felony cases.*—(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the

judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

"(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this Section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits

prescribed by law." (Ga. Laws 1974, pp. 352, 358).

Ga. Code Ann. § 27-2534.1.

"27-2534.1. *Mitigating and aggravating circumstances; death penalty.*—(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed." (Ga. Laws 1973, p. 159, 164).

Ga. Code Ann. § 27-2537.

"27-2537. *Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire

record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authoized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the

Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence." (Ga. Laws 1973, pp. 159, 164).

Ga. Code Ann. § 70-301 (1975 Supp.):

"Section 16. All applications for new trial, except in extraordinary cases shall be made within thirty (30) days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury. The motion may be amended any time on or before the ruling thereon, and where the grounds thereof require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension

of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing, or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed. The grounds of the motion need not be approved by the court. The motion may be heard in vacation or term time, but where not heard at the time named in the order, whether in term time or vacation, it shall stand for hearing at the next term or at such other time in term or vacation as the court by order at any time may prescribe, unless sooner disposed of. Motions for new trial in cases in which the death penalty is imposed shall be given priority. On appeal, a party shall not be limited to the grounds urged in the motion, or any amendment thereof. The court also shall be empowered to grant a new trial on its own motion within thirty (30) days from entry of the judgment, except in criminal cases where the defendant was acquitted." (Ga. Laws 1973, pp. 159, 168).

Severability Clause in 1973 Act:

"Section 10. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional." (Ga. Laws 1973, pp. 159, 172).

Effective Date, 1973 Act:

"Section 11. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval. The Supreme Court may suspend consideration of death penalty

cases until January 1, 1974, or such earlier times as the court determines it is prepared to make the comparisons required under the provisions of this Act." (Ga. Laws 1973, pp. 159, 172).

Repealer, 1973 Act:

"Section 12. All laws and parts of laws in conflict with this Act are hereby repealed. Approved March 28, 1973." (Ga. Laws 1973, pp. 159, 172).

2. Georgia's Murder Statute

Ga. Code Ann. § 26-1101 (1972 Rev.)

"26-1101. *Murder.*—(a) A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abondoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life." (Ga. Laws 1968, pp. 1249, 1276).

APPENDIX B

COMPENDIUM OF GEORGIA DEATH PENALTY CASES

NAME	CITE		AGGRAVATING CIRCUMSTANCE 1/	FACTS
COLEY	231 Ga. 829, 204 S.E.2d 612 (1974)	Conviction aff'd.; sentence reversed		Armed robbery; rape - victim did not die
HOUSE	232 Ga. 140, 205 S.E.2d 217 (1974), cert. den., 428 U.S. 915, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-7	sodomy - choked to death
EBERHEART	232 Ga. 247, 206 S.E.2d 12 (1974), cert. den., 433 U.S. 917 (1976), sentence vacated	Aff'd.	2	Kidnapping; rape - victim did not die
GREGG	233 Ga. 117, 210 S.E.2d 659 (1974), aff'd., 428 U.S. 153, rehng. den., 429 U.S. 875 (1976)	Aff'd.	2-4	robbery; shooting

1/ Refers to statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
ROSS	233 Ga. 361, 211 S.E.2d 356 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-8	robbery-shot cop
HOOKS	233 Ga. 149, 210 S.E.2d 668 (1974), cert. granted, 433 U.S. 917 (1977), sentence vacated	Aff'd.	7	rape - no murder
McCORQUODALE	233 Ga. 369, 211 S.E.2d 577 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2-7	rape - strangulation & torture
MOORE	233 Ga. 861, 213 S.E.2d 829 (1974), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 873 (1976)	Aff'd.	2	robbery-shooting
FLOYD	233 Ga. 280, 210 S.E.2d 810 (1974), cert. den., 431 U.S. 949, rehng. den., 434 U.S. 882 (1977)	Aff'd.	2-7	robbery-shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
STACK	234 Ga. 19, 214 S.E.2d 514 (1975)	Conviction and sentence reversed		Stabbing
OWENS	233 Ga. 869, 214 S.E.2d 173 (1975)	Conviction aff'd.; sentence reversed		Stabbing
PREVATTE	233 Ga. 929, 214 S.E.2d 365 (1975)	Conviction aff'd.; sentence reversed		Not stated
JORDAN	233 Ga. 929, 214 S.E.2d 365 (1975)	Conviction aff'd.; sentence reversed		Not stated
JARRELL	234 Ga. 410, 216 S.E.2d 258 (1975)	Aff'd; one death penalty reversed	2-3-4-7	Kidnapping; robbery; shooting
MITCHELL	234 Ga. 160, 214 S.E.2d 900 (1975), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	2	Robbery; shooting
CHENAULT	234 Ga. 216, 215 S.E.2d 223 (1975), cert. den., 434 U.S. 878, rehng. den., 434 U.S. 976 (1977)	Aff'd.	3	Open shooting in church

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
COKER	234 Ga. 555, 216 S.E.2d 782 (1975)	Aff'd.	1-2	Rape; robbery; kidnapping; no murder
TAMPLIN	235 Ga. 20, 218 S.E.2d 779 (1975)	Aff'd. conviction; sentence reversed		Robbery; shooting
BANKS	235 Ga. 121, 218 S.E.2d 851 (1975)	judgment reversed		Shotgun shooting
BERRYHILL	235 Ga. 549, 221 S.E.2d 185 (1975), cert. den., 429 U.S. 1054, rehng. den., 430 U.S. 911 (1977)	Aff'd.	2	Robbery; shooting
SMITH (JOHN)	236 Ga. 12, 222 S.E.2d 308 (1976), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	4	Shooting for insurance benefits
SMITH (REBECCA)	236 Ga. 12, 222 S.E.2d 308 (1976), cert. den., 429 U.S. 932, rehng. den., 429 U.S. 1055 (1977)	Aff'd.	4	Shooting for insurance benefits

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
BARROW	235 Ga. 635, 221 S.E.2d 416 (1975)	judgment reversed		Robbery; shooting
MASON	236 Ga. 46, 222 S.E.2d 339 (1976), cert. den., 428 U.S. 910, rehng. den., 429 U.S. 874 (1976)	Aff'd.	1	Shooting of girlfriend
BROWN	235 Ga. 644, 220 S.E.2d 922 (1975)	Aff'd. conviction; reversed sentence		Robbery; shooting
DOBBS	236 Ga. 427, 224 S.E.2d 3 (1976), cert. den., 430 U.S. 975, rehng. den., 431 U.S. 960 (1977)	Aff'd.	2	Robbery; shotgun shooting
COLEMAN	237 Ga. 84, 226 S.E.2d 911 (1976), cert. den., 431 U.S. 909, rehng. den., 431 U.S. 961 (1977)	Aff'd.	2	Multiple execution
ARNOLD	236 Ga. 534, 224 S.E.2d 386 (1976)	Aff'd., conviction; sentence reversed	1	Robbery; shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GOODWIN	236 Ga. 339, 223 S.E.2d 703 (1976), cert. den., 431 U.S. 909, rehng. den., 432 U.S. 911 (1977)	Aff'd.	2	Robbery; shooting
PULLIAM	236 Ga. 460, 224 S.E.2d 8 (1976), cert. den., 428 U.S. 911, rehng. den., 429 U.S. 874 (1976)	Aff'd.	2-4	Shooting of cab driver
SPENCER	236 Ga. 697, 224 S.E.2d 910 (1976), cert. den., 429 U.S. 932, rehng. den., 429 U.S. 1055 (1977)	Aff'd.	1-9-10	Shooting of deputy while escaping
DAVIS	236 Ga. 804, 225 S.E.2d 241 (1976), reversed, 429 U.S. 122 (1976)	Aff'd.	1-2-7	Robbery; beating; shooting
BIRT	236 Ga. 815, 225 S.E.2d 248 (1976), cert. den., 429 U.S. 1029 (1976)	Aff'd.	2-4-7	Robbery; strangulation
STREET	237 Ga. 307, 227 S.E.2d 750 (1976), reversed in part, 429 U.S. 995 (1976)	Aff'd.	2	Stabbing; drowning

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GIBSON	236 Ga. 874, 226 S.E.2d 63 (1976), cert. den., 429 U.S. 986, rehng. den., 429 U.S. 1124 (1977)	Aff'd.	2	Rape; shooting
STEPHENS	237 Ga. 259, 227 S.E.2d 261 (1976), cert. den., 429 U.S. 986, rehng. den., 429 U.S. 1067 (1977)	Aff'd.	1-9	Robbery; shooting
ISSACS	237 Ga. 105, 226 S.E.2d 922 (1976), cert. den., 429 U.S. 986 (1976)	Aff'd.	2	Multiple, execution style
BANKS	237 Ga. 325, 227 S.E.2d 380 (1976), cert. den., 430 U.S. 975 (1977)	Aff'd.	7	Shotgun shooting
DUNGEE	237 Ga. 218, 227 S.E.2d 746 (1976), cert. den., 429 U.S. 986 (1976)	Aff'd.	2	Multiple, execution style
HARRIS	237 Ga. 718, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933, rehng. den., 434 U.S. 882 (1977)	Aff'd.	7	Shooting in head

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
DORSEY	237 Ga. 876, 230 S.E.2d 307 (1976)	judgment reversed	former conviction in federal court barred this action	Bank robbery & shooting of hostage
HILL	237 Ga. 794, 229 S.E.2d 737 (1976)	Aff'd.	1-7	Robbery; stabbing to death
YOUNG	237 Ga. 852, 230 S.E.2d 287 (1976)	Aff'd.	2-4	Shooting of bank president
DIX	238 Ga. 209, 232 S.E.2d 47 (1977)	Aff'd.	7	Beating; stabbing; strangled wife
DOUTHIT	239 Ga. 8, 235 S.E.2d 493 (1977), application for stay, 436 U.S. 923 (1978)	Aff'd.	4	Shooting for insurance benefits
PRYOR	238 Ga. 698, 234 S.E.2d 918 (1977), cert. den., 431 U.S. 935, rehng. den., 434 U.S. 1003 (1977)	Aff'd.	2	Kidnapping; shotgun shooting
GADDIS	239 Ga. 238, 236 S.E.2d 594 (1977), cert. den., 434 U.S. 1088, rehng. den., 435 U.S. 981 (1978)	Aff'd.	2-4-7	Robbery; strangulation

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
BLAKE	239 Ga. 292, 236 S.E.2d 637 (1977), cert. den., 434 U.S. 960 (1977)	Aff'd.	7	Threw baby off bridge
YOUNG	239 Ga. 53, 236 S.E.2d 1 (1977), cert. den., 434 U.S. 1002, rehng. den., 434 U.S. 1051 (1977)	Aff'd.	2-7	Burglary; beating to death
WARD	239 Ga. 205, 236 S.E.2d 365 (1977)	Aff'd. conviction; reversed sentence	7 previous trial ended in life sentence	Stabbing
PEEK	239 Ga. 422, 238 S.E.2d 12 (1977), cert. den. ___ U.S. ___, 99 S.Ct. 218 (1978)	Aff'd	2	Rape; beating to death
BOWDEN	239 Ga. 821, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978)	Aff'd	2	Robbery; beating to death
HAWES	239 Ga. 630, 238 S.E.2d 418 (1977)	Aff'd. conviction; reversed sentence		Robbery; shooting
CORN	240 Ga. 130, 240 S.E.2d 694 (1977), cert. den., 436 U.S. 914, rehng. den., 438 U.S. 908 (1978)	Aff'd.	2-4-7	Robbery; stabbing

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
THOMAS	240 Ga. 296, 240 S.E.2d 87 (1977), cert. den., 436 U.S. 914, rehng. den., 438 U.S. 908 (1978)	Aff'd.	2-4-7	Robbery; beating buried alive
STANLEY	240 Ga. 341, 241 S.E.2d 173 (1977), cert. den., ___ U.S. ___, 58 L.Ed.2d 94 (1978)	Aff'd.	2-7	Robbery; beating; buried alive
FLEMING	240 Ga. 142, 240 S.E.2d 828 (1977)	Conviction aff'd.; sentence reversed		Robbery; shooting of police chief
CAMPBELL	240 Ga. 352, 240 S.E.2d 828 (1977), cert. den., ___ U.S. ___, 58 L.Ed.2d 194 (1978)	Aff'd.	2-7	Robbery; beating to death
SPRAGGINS	240 Ga. 759, 243 S.E.2d 20 (1978)	Conviction aff'd.; sentence reversed		Rape, stabbing; mutilation
DAVIS	240 Ga. 763, 243 S.E.2d 12 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing; mutilation
REDD	240 Ga. 753, 242 S.E.2d 628 (1978)	Conviction aff'd.; sentence reversed		Robbery; beating

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
MOORE	240 Ga. 807, 243 S.E.2d 1 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 268 (1978)	Aff'd.	2	Robbery; shooting
POTTS	241 Ga. 67, 243 S.E.2d 510 (1978)	Aff'd.	2	Kidnapping; shooting
PRESNELL	241 Ga. 49, 243 S.E.2d 496 (1978), Opinion of Ga. S.Ct. vacated, ___ U.S. ___, 99 S.Ct. 235 (1978). 243 Ga. 131, 252 S.E.2d 625 (19), cert. den., ___ U.S. ___, 62 L.Ed.2d 115 (1979)	Aff'd.	2	Rape; drowning
LAMB	241 Ga. 10, 243 S.E.2d 59 (1978)	Aff'd. conviction		Unprovoked shotgun shooting
DAVIS	241 Ga. 376, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)	Aff'd.	1-7	Robbery; beating; shooting
MORGAN	241 Ga. 485, 246 S.E.2d 198 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2418, rehng. den., Nov. 26, 1979).	Aff'd.	7	Robbery; shotgun shooting

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
HALL	241 Ga. 252, 244 S.E.2d 833 (1978)	Conviction aff'd.; sentence reversed	co-defendant triggerman received life sentence	Shooting during robbery
SPIVEY	241 Ga. 477, 246 S.E.2d 288 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2418 (1979)	Aff'd.	2	Robbery; shooting
POTTS	241 Ga. 67, 243 S.E.2d 510 (1978)	Aff'd.	2	Kidnapping; shooting
ALDERMAN	241 Ga. 496, 246 S.E.2d 642 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 593 (1979)	Aff'd.	4-7	Beating for insurance benefits
GRIGGS	241 Ga. 317, 245 S.E.2d 269 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing; strangulation
DRAKE	241 Ga. 583, 247 S.E.2d 57 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 1265 (1978)	Aff'd.	2-7	Robbery; beating
BOWEN	241 Ga. 492, 246 S.E.2d 322 (1978)	Conviction aff'd.; sentence reversed		Rape; stabbing
WESTBROOK	242 Ga. 151, 249 S.E.2d 524 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 881 (1979)	Aff'd.	2-7	Rape; beating to death

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
GREEN	242 Ga. 261, 249 S.E.2d 1 (1978), vacated as to sentence, ___ U.S. ___, 99 S.Ct. 2150 (1979). 244 Ga. 27 (1979).	Aff'd.	2-7	Kidnapping; shooting
JOHNSON	242 Ga. 649, 250 S.E.2d 394 (1978)	Aff'd.	7	Kidnapping; rape; execution
FINNEY	242 Ga. 582, 250 S.E.2d 288 (1978), cert. den., ___ U.S. ___, 99 S.Ct. 2017 (1979)	Aff'd.	2-7	Rape; beating
BURGER	242 Ga. 28, 247 S.E.2d 834 (1978)	Conviction aff'd.; sentence reversed		Robbery; rape; drowning
STEVENS	242 Ga. 34, 247 S.E.2d 838 (1978)	Conviction aff'd; sentence reversed		Robbery; rape; drowning
RUFFIN	243 Ga. 95, 252 S.E.2d 472 (1979), cert. den., ___ U.S. ___, Dec. 10, 1979)	Aff'd.	2-7	Robbery; execution style; shotgun shooting
COLLINS	243 Ga. 291, 253 S.E.2d 729 (1979), cert. pending	Aff'd.	2-7	Robbery; beating
REDD	242 Ga. 876, 252 S.E.2d 383 (1979)	Aff'd.	2-7	Robbery; beating

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
WILLIS	243 Ga. 185, 253 S.E.2d 70 (1979), cert. den., ___ U.S. ___, 62 L.Ed.2d 116 (1979)	Aff'd.	7-8-10	Robbery; shot cop
FLEMING	243 Ga. 120, 252 S.E.2d 609 (1979), cert. den., ___ U.S. ___, 62 L.Ed.2d 115 (1979)	Aff'd.	2-5	Robbery, shot cop
DAVIS	242 Ga. 901, 252 S.E.2d 443 (1979), cert. pending	Aff'd.	2-7	Rape; stabbing; multilation
SPROUSE	243 Ga. 831 (1979)	Aff'd. conviction; reversed sentence		Kidnapping;rape; execution style shooting
GODFREY	243 Ga. 302, 253 S.E.2d 710 (1979), cert. granted, ___ U.S. ___, 62 L.Ed.2d 133 (1979)	Aff'd.	7	Shotgun shooting of wife and mother-in-law
HOLTON	243 Ga. 312, 253 S.E.2d 736 (1979)	Aff'd. conviction; sentence reversed	7 found depravity of mind but didn't use essential statutory language of aggravating circumstance	Robbery;stabbing

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
SPRAGGINS	243 Ga. 73, 252 S.E.2d 620 (1979), cert. pending	Aff'd.	7	Rape; stabbing; mutilation
AMADEO	243 Ga. 627, 255 S.E.2d 718 (1979), cert. den., Nov. 1979	Aff'd.	2	Robbery;shooting
LEGARE	243 Ga. 744 (1979), cert. den. Dec. 1979.	Aff'd.	2-7	Robbery; beating to death
BAKER	243 Ga. 710, 257 S.E.2d 192 (1979), cert. pending.	Aff'd.	2-7	Robbery; shooting
JONES	243 Ga. 820 (1979), cert. pending.	Aff'd.	2-3	Robbery; shooting
HAMILTON	244 Ga. 145 (1979)	Aff'd.	2-7	Robbery, beating stabbing
COLLIER	___ Ga. ___, Decided Oct. 31, 1979	Aff'd.	2-8-10	Robbery; killing of police officer, resisting arrest
COBB	244 Ga. 344 (1979)	Sentence reversed		Robbery; murder
GATES	___ Ga. ___ (Decided Oct. 24, 1979)	Aff'd.	2-7[2/]	Rape; murder; robbery

2/ Reversed as to seventh statutory aggravating circumstance.

16b

NAME	CITE		AGGRAVATING CIRCUMSTANCE	FACTS
TUCKER	Ga. (Decided Nov. 21, 1979)	Aff'd.	2	Murder; kidnapping with bodily injury; aggravated sodomy

APPENDIX C

GEORGIA DEATH PENALTY CASES INVOLVING PREMEDITATED MURDER

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974)
Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974)
Chenault v. State, 234 Ga. 216, 215 S.E.2d 233 (1975)
Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976)
Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1976)
Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977)
Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977)
Young v. State, 239 Ga. 53, 236 S.E.2d 1 (1977)
Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977)
Thomas v. State, 240 Ga. 393, 240 S.E.2d 87 (1977)
Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977)
Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977)
Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977)
Redd v. State, 240 Ga. 753, 242 S.E.2d 628 (1978)
Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978)
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Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978)
Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978)
Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978)
Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978)
Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978)
Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978)
Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979)
Hamilton v. State, 244 Ga. 145, ____ S.E.2d ____ (1979)
Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979)
Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979)
Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978)
Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978)
Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979)
Collier v. State, ____ Ga. ____ (Case No. 35063, Decided Oct. 30, 1979)

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE WITH BRIEF ATTACHED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

VS.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

INTEREST OF THE MOVENT

Movent Rayfield Newlon was sentenced to death November 11, 1979, in the Circuit Court of St. Louis County, Missouri, under the Missouri Capital Murder Statute (§565.012.2(7) V.A.M.S.) pursuant to a jury finding of guilt August 3, 1979, and a verdict fixing the punishment at death, returned August 4, 1979, in the following words (Exhibit 2):

> "We the jury, having found the defendant guilty of the capital murder of Mansfield Dave, fix the punishment at

death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

"Instruction No. 19

"Aggravating circumstance No. 2

"Whether the muder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman."

The Missouri statute (omitting mitigating circumstances as irrelevant) is set out as exhibit 3 hereto.

Newlon's post-trial motions challenged (inter alia) the statute, the instruction, and the verdict as unconstitutionally vague under the due process clause of Amt. XIV, Const. U.S. Movent's notice of appeal to the Missouri Supreme Court, where his appeal is presently pending as docket No. 61, 798, contained a jurisdictional statement asserting such unconstitutionality. Briefs are not yet due.

The jury in movent's trial, second phase, like that in Gates v. Georgia, discussed in petitioner's brief p. 21, made a request for clarification to the trial judge (Exh. 1), reading,

"Please give a definition of 'depravity of mind.' "

In movent's case the request was not answered.

While the *question presented* in this case by its terms raises only the issue of the propriety of the *application* of the statute under the U.S. due process clause, logic demonstrates that any resolution of this question necessarily and implicitly must resolve the question of the constitutionality against due process of the statute itself. The latter is "fairly comprised" in the former. Sup. Ct. Rule 40(d)(1).

Accordingly the principle question on the issue of whether movent lives or dies will be resolved in this case.

QUESTION OF LAW NOT ADEQUATELY PRESENTED

The parties have defined the *question presented* here, and have briefed the case as if this Court, in Gregg v. Georgia 428 U.S. 200, at 291, 96 S. Ct. 2909 at 2938, had decided that this seventh aggravating circumstance of the Georgia statute was constitutional, on its face, against due process; and that only the constitutionality of its application in any case ("so broad"-"open-ended construction") could still be considered.

But this question was not before the Court in *Gregg*, and the short paragraph, which is the predicate for this mistaken interpretation, was concurred in by only *three* of the nine justices. It is not *stare decisis*.

The threshold question of the constitutionality of the statute, which must be resolved before coming to the question of whether it was constitutionally applied, is still open; and is not adequately presented because of a mistaken interpretation of what was said in one of the four opinions in *Gregg*.

COMPLIANCE WITH RULE 42

Council for both parties, Mr. J. Calloway Holmes, Jr., counsel for petitioner and Mr. John W. Dunsmore, counsel for respondent, have both told counsel for movent by telephone that they would consent to the grant of this motion. Written consents will be filed with the Clerk as soon as possible; but because of the lateness of the application, the preparation of the motion will not be delayed pending receipt.

Counsel regrets that he is unable to comply with the time requirements for filing an amicus curiae brief under the rule; the pendency of this case and the nature of the issues presented came to the attention of present counsel for petitioner only on January 4, 1980, when he received through the N.A.A.C.P. Legal Defense Fund, via prior counsel, a copy of petitioner's brief. He has proceeded with the utmost effort since then to ob-

tain the necessary consents and to prepare the motion and the tendered brief.

Wherefore, movent prays that leave be granted him to file the annexed brief as an amicus curiae.

Lon Hocker
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Clayton, Missouri 63105
727-5822

Attorney for Movent

EXHIBIT 1

SUPPLEMENTAL TRANSCRIPT

Dated: 11 Jan., 1980

FURTHER THEREAFTER, on the 4th day of August, 1979, at the approximate hour of 11:30 a.m., the Defense attorney being present, Mr. Ayers, and the State of Missouri being represented by and through Prosecuting Attorney George Westfall, the following proceedings are conducted in Div. No. 14 St. Louis County Circuit Court, by The Honorable James Ruddy, Presiding Judge, OUTSIDE THE HEARING OF THE MEMBERS OF THE JURY:

* * * * * * * * *

THE COURT: At 11:30 a.m., this note came back from the Jury: "Please give a definition of 'depravity of mind'." Signed, A. Arnold. And I told them that I could not give them any further instructions.

* * * * * * * *

Certification of Certified Court Reporter

I SUSAN J. MASERANG, Official Reporter of Div. No. 14, St. Louis County Circuit Court 21st Judicial Circuit, do hereby certify that this is a true, correct and accurate transcript of my machine-shorthand notes taken at the time and place stated above.

Dated: 11 Jan., 1980

/s/ Susan J. Maserang, CCR
Div. No. 14
St. Louis County Circuit
Court

* * * * * * * *

EXHIBIT 2

We, the jury, having found the defendant guilty of the capital murder of Mansfield Dave, fix the punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

Instruction No. 19

Aggravating Circumstance No. 2

Whether the muder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

/s/Amos Arnold

Filed: Aug. 4, 1979

State of Missouri
County of St. Louis ss

I, Raymond V. Clifford, Circuit Clerk, within and for the County and State aforesaid, certify the above to be a full, true and complete copy of the verdict in the above entitled cause, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Clayton, Missouri this 11 day of January, 1980.

Raymond V. Clifford
Circuit Clerk
By Eileen A. Gorke
Deputy Clerk

(Seal)

EXHIBIT 3

556.012. Evidence to be considered in assessing punishment in capital murder cases.—1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggraving circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

* * * * * * *

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

(L.1977 H.B 90 § 5)
Effective 5-26-77

IN THE

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OCTOBER TECUM 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF AMICUS CURIAE

TABLE OF AUTHORITIES

A. INTEREST OF AMICUS

The interest of the amicus curiae in this case is as stated in the motion for leave to file this brief, supra.

B. ARGUMENT

The Georgia statutory aggravating circumstance under which Godfrey is sentenced to death is identical (so far as relevant to either case) to the Missouri statutory aggravating circumstances under which Newlon, the amicus, is sentenced to death. A decision here having the effect of upholding the facial constitutionality of the statutes against due process would control this issue in both cases.

The "question presented", as stated in the petition and briefs, by its terms raises only the question of whether the *application* of the statute was too broad and too vague. But a resolution of that question necessarily involves the resolution of the preliminary question of whether the statute, however applied, is constitutional. If the clause is unconstitutional, the question of whether it was constitutionally applied is *a fortiori* moot. Therefore a decision one way or the other on the propriety of its application would implicitly hold the statute constitutional.

Supreme Court rule 40(d)(1) provides,

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein"

Accordingly the question presented by this certiorari necessarily includes the question of the facial validity of the statute itself. Can we imagine this Court's saying, "We pass the question of the constitutionality of the statute as not before us under the question presented, and we hold the application of the statute to the facts in the case is not overbroad" (or is "overbroad")?

The parties have defined the question presented and briefed the case as if Gregg v. Georgia had decided, once for all, that this aggravating circumstance is constitutional on its face, if only the application of it is not too broad or "open ended", following the language of the paragraph in Gregg at 428 U.S. 201, 96 S. Ct. 2938.

This is a mistake. No such decision was made in Gregg, for two reasons: a) the question discussed was *coram non judice*, and b) what was said on this subject in *Gregg* was said by far less than a majority of the court—not even a plurality.

The jury in Gregg's case had not found the existence of this aggravating circumstance. As pointed out in the syllabus, the jury found that two of the three aggravating circumstances existed, but declined to find that the murder was, "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of (the) mind of the defendant." Syllabus 96 S.Ct. 2909, 2915. See also opinion of Mr. Justice White, 428 U.S. 222, 218, 96 S.Ct. 2909, 2946:

> "The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, *except that it did not find the crimes to have been 'outrageously or wantonly vile,' etc.*" Italics added.

The judicial power of this Court, like that of all the courts of the United States, is limited to the cases and controversies enumerated in U.S. Constitution, Art. III, Sec. 2. What this Court, or any federal court, may say on any issue which is not before it can, under the constitutional provision, have no judicial effect.

> " The judicial power does not extend to the determination of abstract questions." Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 324, 56 S. Ct. 466, 472.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may

> present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.
>
> 349 U.S. 70, 74, 75 S. Ct. 614, 616 Rice v. Sioux City Mem. Pk. Cemetery
>
> "We do not sit, however, 'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . .'."
>
> Thorpe v. Housing Authority, 393 U.S. 268, 284, 89 S. Ct. 518, 527

Clearly what was said about the seventh aggravating circumstance in *Gregg* was said by-the-by, an obiter dictum, a thin law review article, and not as a step toward the resolution of a case or controversy. It was without effect in Gregg's case, and it is without effect as a precedent.

Secondly, what was said in the Gregg opinions at 1.c U.S. 201, S. Ct. 2938, about "the seventh statutory aggravating circumstance", was said in the opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens—just one-third of the Court. Nothing like this statement appears in the opinion of Mr. Justice White, in which the Chief Justice and Mr. Justice Rehnquist joined. Of course, the dissents of Mr. Justice Brennan and Mr. Justice Marshall (428 U.S. 227 and 231, 96 S. Ct. 2871 and 2973) contain no such statement. Even the language of the Stewart, J., opinion is hedged by the foot-note that all the then known death judgments under the seventh aggravating circumstance also included a finding of another factual aggravating circumstance (as did even the McCorquodale decision - viz. torture).

Thus, the constitutionality against due process of the seventh aggravating circumstance *on its face*, rather than as "too broad-

ly construed," is an open question in this Court, and its constitutionality must be decided first, before the constitutionality of its *application* can be reached.

We now turn to the issue itself.

An examination of the aggravating circumstances in the Georgia statute (as in the Missouri statute) reveals that all the statutory circumstances *but one* deal with factual events: prior record, in the course of burglary or arson, in a public place and danger to more than one person, to obtain money, etc., etc. All these criteria are capable of application to the *facts* brought forward at the trial. Whatever may be said about the whole statutory scheme, it cannot reasonably be said that these other circumstances are unconstitutionally vague.

But except for the element of "torture" (in both statutes) and "aggravated battery" (in the Georgia statute)—neither of which was found in either case—the seventh circumstance is an "omnium gatherum", a circus tent which will cover any murder, and which seeks to bring the law back to where it was before Furman. If the jury finds that the murder was "bad", the defendant is executed.

For the criteria (sans torture and battery) of the seventh aggravating circumstance are all *subjective*, i.e. they deal with the reaction of jurors and judges to the circumstances of the crime, and not with the factual circumstances themselves.

Leaving out the torture and aggravated battery elements as not involved here, the statute authorized a judgment of death if:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved—depravity of mind."

We append a little glossary of the statutory terms as defined in Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1961.

Outrage: (1) Extravagant or violent misdoing; wrong done to persons or things.

Wanton: (1) Orig., undisciplined; unruly. (4) Marked by arrogant recklessness of justice, of the feelings of others, or the like.

Vile: (2) Morally base, wicked, sinful — (4) Loosely, objectionable for any reason; bad; as vile weather.

Horrible: Exciting, or tending to excite, horror; dreadful; shocking.

Horror: A painful emotion of fear, dread and abhorrence; great aversion and repugnance.

Inhuman: (1) Destitute of human or humane feeling; cruel; brutish. (2) Unlike what is normally human; nonhuman.

Humane: (1) Having feelings and inclinations creditable to man; kind; benevolent.

Depravity: (1) State of being depraved; corruption.

Depraved: Characterized by corruption; esp. perverted, evil.

Corruption: (1) A corrupting, or state of being corrupt; as (a) Decay (b) Depravity; impurity (c) Bribery.

Corrupt: (2) Changed from a state of uprightness, correctness, truth, etc., to a bad state; depraved.

Every one of these words deals not with facts, but with emotions—the subjective emotional responses of people made aware of facts. The problem is: Whose responses are to govern? For what is depravity of mind to one may be deprivation of upbringing to another—a bull fight may be a drama to you, but horrible to me. So it goes. These pejorative words define nothing. Wickedness, like beauty, is in the eye of the beholder. This is the type of vague standards constitutionally impermissible under all the decisions.

In Cramp v. Board of Public Instruction, etc., 368 U.S. 285, 287, 82 S. Ct. 275, 280 (1961) the Supreme Court held:

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L.Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L.Ed. 888. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L.Ed. 200. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 243, 52 S. Ct. 559, 568, 76 L.Ed. 1062."

And in Grayned v. City of Rockford, 408 U.S. 106, 108, 92 S. Ct. 2294, 2298, the Supreme Court held:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person

> of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The words used are impermissibly vague, certainly, but what about the syntax? What is meant by the phrase "in that it involved depravity of mind"?

Does this mean that if a crime "involved" depravity of mind, it is *ipso facto* vile, horrible or inhuman? Or did the legislature mean that the jury must find vile, horrible or inhuman, and also depravity of mind? Or as the Georgia courts held in this case, does a finding of vile, horrible *and* inhuman constitute a finding of depravity of mind?

What is meant by "involved", anyway? Could the "depravity of mind" of an accomplice charged in a murder be the criterion for the defendant's death sentence? The statute does not require depravity of *defendant's* mind. It requires only that the depravity of *someone's* mind be "involved" in the crime. In the Gates case the trial judge held that it meant the *victim's* mind! Petitioner's Br. p. 21.

Note also the double disjunctive: "Outrageously or wantonly", and "vile, horrible or inhuman." There are six possibilities under the criterion: outrageously horrible, wantonly horrible, outrageously inhuman, wantonly inhuman, outrageously vile and wantonly vile.

Something for everybody.

These difficulties of language, however inscrutable they may seem, pale beside the central difficulty of comprehending what is meant by "depravity of mind". Apart from the problem of *whose mind* must be depraved and how the depraved mind must be *involved*, we are at a loss to comprehend what the legislatures meant by the word "depravity".

All the dictionaries we have consulted—Websters, Century, Oxford English—define depravity in terms of corruption or wickedness. Corruption is frequently defined in terms of depravity, explaining in a circle. The Century illustrates with a quotation from Macauley, "Machiavelli",

> "Succeeding generations change the fashion of their morals, . . . wonder at the depravity of their ancestors."

No matter how you slice this statutory aggravating circumstance it says only one thing over and over: bad, bad, bad.

If the crime is a bad one you can sentence the man to death.

Not many juries have the nerve to ask the trial judge what his instructions mean. It is of the most penetrating significance that two juries, one in Florida (Gates) and one in Missouri (Newlon) should ask the judge what he meant by "depravity of mind". Exhibit 1. Yet both sentenced the defendants to death by finding depravity. In Godfrey's case it is simply ignored.

Furman, where are you now?

C. CONCLUSION

The conviction must be reversed.

Respectfully submitted,

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